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91-987

No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITY AND COUNTY OF SAN FRANCISCO and
THE AIRPORTS COMMISSION OF THE
CITY AND COUNTY OF SAN FRANCISCO,
Petitioners,

v.

U.S. FEDERAL AVIATION ADMINISTRATION,
BARRY HARRIS, ACTING ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION, and
JAMES B. BUSEY IV, ACTING SECRETARY OF
TRANSPORTATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state or local agency, by accepting federal grant funds under statutes and regulations that are silent on the issue, subjects its otherwise final adjudicatory determinations to *de novo* review and redetermination by the Federal agency that administers the grant program.

2. Whether an airport proprietor has the authority to adopt a long-noticed deadline on the admission of additional noisy aircraft when it has a reasonable or rational basis for concluding that the deadline would decrease the noise of airport operations.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The City and County of San Francisco and the Airports Commission of the City and County of San Francisco (referred to collectively hereafter as "San Francisco") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. That court affirmed in part and reversed in part an order of the Administrator of the Federal Aviation Administration ("FAA Administrator")

that found that San Francisco's 1978 Noise Abatement Regulation exceeded the lawful authority of an airport proprietor to control noise impacts from airport operations.[1]

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 941 F.2d 1391 and is reproduced at app., *infra,* 1a. The FAA Administrator's Decision and Final Order of Noncompliance and Default is reproduced at app., *infra,* 28a, and the Initial Decision of Chief Administrative Law Judge is reproduced at app., *infra,* 58a.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1991. On November 7, 1991, Justice O'Connor extended the time within which to file a petition for certiorari to and including December 19, 1991. A-326. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Spending Clause, Article 1, § 8, of the United States Constitution provides that "Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States. . . ."

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[1] San Francisco is not seeking review of the portion of the Ninth Circuit's judgment which reviewed a separate order of the FAA Administrator denying San Francisco's application for airport grant funds for fiscal years 1986 and 1987. App., *infra,* 20a-22a. The Ninth Circuit held, in reviewing that order, that the FAA had unlawfully failed to approve San Francisco's application for grant funds and directed that the FAA approve the application. *Id.*

Grant Assurance No. 20 of the airport grants issued under the Airport Development Assistance Program provides, in relevant part:

> Public use and benefit. It [the Sponsor] agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination. . . .

The San Francisco Airports Commission's 1978 Noise Abatement Regulation is set forth at app., *infra*, 124a.

STATEMENT OF THE CASE

A. San Francisco's 1978 Noise Abatement Regulation

San Francisco International Airport ("SFIA") is situated on San Francisco Bay in the midst of densely populated San Mateo County.[2] Since the mid-1960's, when turbojets began frequent operations at SFIA, residents of neighboring communities have vehemently and persistently protested to San Francisco the noise of aircraft operations at SFIA. The noise impact of SFIA increased in the 1970's. In 1976, noise monitoring by San Francisco showed that 13,000 homes containing 35,000 residents and 17 schools were within the 65 CNEL noise contour of SFIA.[3] By

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[2] SFIA is owned and operated by the City and County of San Francisco through an independent agency established by the San Francisco Charter, the Airports Commission of the City and County of San Francisco ("Airports Commission").

[3] The 65 CNEL noise contour defines the area in which the CNEL, a measurement of cumulative noise, equals or exceeds 65. Under California law, it is unlawful to operate an airport if there are any residences within the 65 CNEL noise contour, unless the airport proprietor has been granted a variance by the Director of the California Department of Transportation. 21 Cal. Admin. Code § 5012. R.318 at 13; R.319 at Exhibit 6, p.8. ("R." refers to the consecutive numbers in the Certified List of Record filed by the FAA with the Ninth Circuit.)

1980, 15,500 homes containing 41,900 residents and 20 schools were within the 65 CNEL noise contour.[4]

In an effort to ameliorate the noise impact of SFIA, the Airports Commission in 1978 adopted its first Noise Abatement Regulation ("1978 Regulation"). App., *infra*, 124a. The 1978 Regulation prohibited Stage 1 aircraft types (the most noisy category then operating at SFIA) from operating after January 1, 1985 unless they had been retrofitted and certified by the FAA by that date as meeting Stage 2 requirements (the intermediate noise category). App., *infra*, 127a (Part 1). In addition, Stage 2 aircraft types not operating at SFIA at the time the 1978 Regulation was adopted were required to commence operations at SFIA, if at all, by January 1, 1985. App., *infra*, 127a (Part 2). All aircraft operators were, thus, given over six years to bring themselves into compliance with the 1978 Regulation, which when fully effective after January 1, 1985, would require operators at SFIA to use either a Stage 3 aircraft type (the least noisy category) or a "grandfathered" Stage 2 aircraft type.[5]

The 1978 Regulation also provided a procedure whereby aircraft operators could seek a waiver from the Regulation.[6] This provision contains hearing procedures under which waiver applications would be heard by the Airports

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[4] The data on the noise impact of aircraft operations at SFIA was presented in the FAA proceeding and was not disputed by the FAA.

[5] The Airports Commission adopted a successor noise abatement regulation on January 22, 1988 ("1988 Regulation"). R.168. The 1988 Regulation provides for the phased elimination of all Stage 2 aircraft operating at SFIA. On January 1, 1989, each operator at SFIA was required to have at least 25% of its total operations at SFIA using Stage 3 aircraft. In subsequent phases, each operator will be required to have at least 50%, 75% and, ultimately, all operations using Stage 3 aircraft.

[6] Although the 1978 Regulation refers to a "variance," all the parties, the FAA, and the court of appeals have used the term "waiver." Therefore, waiver will be used in this petition.

Commission and specifies the public interest factors under which waiver applications would be decided. App., *infra*, 128a-130a. The 1978 Regulation expressly provides that "[u]nder no circumstances will the Airports Commission extend the time of compliance with the Regulation beyond January 1, 1985." App., *infra*, 130a. No judicial review was sought of the 1978 Regulation by any affected party as provided by California law.

In 1979 the Supreme Court of California decided *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied*, 449 U.S. 820 (1980), which held that an airport proprietor is liable on a nuisance theory for injuries sustained by nearby residents from noise caused by aircraft using the airport.[7] On the basis of *Greater Westchester*, noise-impacted residents brought over 350 small claims actions in four organized waves against San Francisco alleging a continuing nuisance because of the noise generated by SFIA, forcing San Francisco to incur over $800,000 in costs and legal fees to defend itself.[8] Ultimately San Francisco was held liable in nuisance for damages incurred in 1981 and 1982 for failing to respond properly "to the acute noise problems at the airport." *In re Airport Small Claims Actions*, Nos. 116824, *et al.* (Sup. Ct. Marin Co., Oct. 11, 1985).[9]

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[7] *Greater Westchester* was reaffirmed in 1985 by the California Supreme Court in *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal. 3d 862, 218 Cal. Rptr. 293, 705 P.2d 866 (1985), *cert. denied*, 475 U.S. 1017 (1986), in which the court held that a resident could treat a noise claim against an airport proprietor as a continuing nuisance, thus permitting plaintiffs to bring repetitive nuisance claims every time a plane takes off.

[8] R.318 at 14. *See City and County of San Francisco v. Municipal Court*, 141 Cal. App. 3d 470, 190 Cal. Rptr. 340 (1983).

[9] R.45 at Exhibit 24.

B. The Burlington Waiver Application to Operate Q707 Aircraft at SFIA

Boeing 707s are Stage 1 aircraft and, pursuant to Subpart E of Part 91 of the Federal Aviation Regulations, 14 C.F.R. § 91.303, have not been permitted to operate in the United States since January 1, 1985. As a result, many 707s which had been operating in the United States were placed in service in other parts of the world or were mothballed. In the fall and winter of 1984/85, Burlington Air Express ("Burlington"), an all-cargo carrier, bought overseas several mothballed 707s and had them retrofitted to meet the FAA's Stage 2 requirements by placing sound absorbing material in the engine casings.[10] These "hushkitted" 707s, commonly referred to as Q707s, received Stage 2 type certification from the FAA in March 1985, app., *infra*, 120a. Because the Boeing 707 already possessed an original type certificate from its previous operation in the United States, the FAA did not require the Q707 to meet the Stage 3 levels it requires of all aircraft applying for original type certificates after November 1975.

Burlington contracted to purchase the Q707s without making any inquiries as to whether they could operate at SFIA; it erroneously assumed that a retrofitted Stage 2 aircraft could operate at any airport in the United States.[11] Burlington first learned that the Q707 could not operate at SFIA under the 1978 Regulation in August 1985 and, thereafter, filed a formal waiver application with the Airports Commission.

On March 18, 1986, the Airports Commission held a duly noticed adjudicatory hearing on the Burlington waiver application. Written and oral evidence was received. Burlington submitted extensive written submissions and the oral testimony of several witnesses, including that of the

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[10] R.370 at 1390.

[11] R.370 at 1401-03; R.318 at 21-22.

engineer who invented and was in charge of installation of the Q707 "hush kit." The FAA made a written submission over the signature of the FAA Chief Counsel and FAA representatives were present at the hearing. Written or oral evidence was also submitted by members of the public and by the Airports Commission staff. The Airports Commission sought detailed noise data on the Q707 from Burlington, the company installing the Q707 hush kit, and the FAA, but was rebuffed by a claim that such data was confidential and proprietary. As a result, the information on the noise characteristics of the Q707 considered by the Commission was limited to that publicly available. The publicly available information indicated that the Q707, as it actually would be operated at SFIA (full-weight, full-thrust), would be louder in the critical takeoff mode than any other aircraft operating at SFIA. A transcript and formal adjudicatory record was prepared of the hearing.[12]

At its meeting on April 15, 1986, the Commission adopted a decision denying Burlington a waiver from the 1978 Regulation. The Commission's decision contained 38 findings setting forth the legal and factual basis for its decision. App., *infra,* 116a-122a. The Commission found, *inter alia,* that operating the Q707 "would affect a significant increase in CNEL [noise] values in three of the four community areas surrounding SFIA" and that San Francisco could incur additional nuisance liability to residents of surrounding communities were the Q707 permitted to operate. App., *infra,* 122a. The Commission further found that, as it would actually be operated at SFIA, the Q707 would be "louder in takeoff mode" than any other aircraft at SFIA. App., *infra,* 121a-122a. Perhaps the critical finding of the Commission was that

> were the Airports Commission to grant to [Burlington] a waiver or variance to operate at SFIA

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[12] See R.45 at Exhibit 12 (the transcript of the Commission hearing).

> on the basis of the facts set forth above, it could be required to grant waivers or variances to other similarly situated carriers seeking to operate the Q707 which, in turn, could result in a significant increase in the noise of the fleet currently operating at SFIA . . . .

App., *infra,* 122a. No party sought judicial review of the Commission's decision as permitted by California law. Cal. Civ. Proc. Code § 1094.5 (1980).[13]

C. The Airport Grant Program and the San Francisco Airport Grants

The Airport and Airway Development Act of 1970 ("AADA"), 49 U.S.C. 1701 *et seq.*, provided federal grant support for airport development projects, 49 U.S.C. 1714, the funds for which were taken from a trust fund derived from taxes on air transportation activities, 49 U.S.C. 1742. The AADA was repealed in 1982 and replaced by the Airport and Airway Improvement Act of 1982 ("AAIA"), 49 U.S.C. app. 2201 *et seq.*, which similarly provides grant funding for airport development projects, 49 U.S.C. app. 2204, through funds which have their ultimate source in taxes imposed on aviation fuel and on air transportation users, 26 U.S.C. 9502. Both the AAIA and the AADA provide a statutory entitlement to a specified level of grant funding to "primary airports," of which SFIA is one, based upon the number of passengers enplaned at the airport. *See, e.g.*, 49 U.S.C. app. 2202(a)(12), 2205(a)(2)(B), 2206(a)(1).

The AADA and the AAIA both require that an airport proprietor seeking grant funding for a project provide an

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[13] Since the denial of its waiver request, Burlington has operated its flights from Oakland International Airport, app., *infra,* 8a. Given the runway configuration of Oakland Airport and its location on the eastern edge of San Francisco Bay, Burlington's operations create less noise impacts on surrounding communities than would its operations at SFIA. R.45 at Exhibit 6, p.8; R.45 at Exhibit 13, p.7.

assurance that the "airport to which the project relates will be available . . . on fair and reasonable terms and without unjust discrimination. . . ." 49 U.S.C. app. 2210(a)(1); 49 U.S.C. 1717. The FAA has never, prior to this case, formally construed this assurance. No regulation or policy statement has ever been adopted by the FAA construing for grant recipients what would constitute "fair and reasonable terms" or "unjust discrimination." This case was tried before the FAA, and decided by the FAA Administrator, on the basis that the proper test for compliance with this grant assurance is derived from the "application of appropriate decisional law." FAA Administrator's Decision, app., *infra*, 51a.

This case was limited, during the course of the FAA proceedings, to a single issue: Whether San Francisco breached its assurance to make SFIA available upon "fair and reasonable terms and without unjust discrimination," which issue was to be determined by reference to the existing decisional law with respect to airport proprietor noise abatement authority.[14]

D. The FAA Enforcement Action

On April 2, 1986, while Burlington's waiver request was still pending before the Commission, Burlington filed a complaint with the FAA based upon its contention that the Commission had unlawfully refused to permit it to operate the Q707 aircraft at SFIA. On July 7, 1986, the

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[14] San Francisco entered into twelve grants under the AADA program between 1971 and 1981, three of which were entered into after the 1978 Regulation had been adopted. San Francisco also entered into six grants under the program established under the AAIA between 1982 and the commencement of this proceeding. San Francisco has not entered into grants since 1986. The AADA and AAIA grant assurances remain in effect for the useful life of the project, but not to exceed 20 years from acceptance of the grant.

FAA Chief Counsel initiated an enforcement action against the Commission, FAA Docket No. 13-86-2.[15]

The FAA enforcement action was assigned to Chief Administrative Law Judge Kane ("ALJ") for a hearing. As a result of the Airports Commission's Motion to Dismiss, four of the five grounds given by the FAA for its enforcement action were dismissed. The only basis for relief which remained was the claim that San Francisco had breached its ADAP Grant Assurance No. 20 requiring it to operate SFIA "on fair and reasonable terms, and without unjust discrimination."[16]

The hearing on the FAA Notice commenced on May 2, 1988, and lasted eight days. Significantly, the FAA never contested the evidence supporting San Francisco's determination that the January 1, 1985 deadline on additional Stage 2 aircraft types had resulted in a decrease of the CNEL noise impact area of SFIA due to the resulting shift to Stage 3 aircraft types by operators at SFIA.[17] Similarly, the FAA never contested the evidence support-

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[15] The FAA notice initiating the enforcement action also stated that, pending the completion of the administrative process, no further FAA airport grants would be made to San Francisco. *See City and County of San Francisco v. Engen*, 819 F.2d 873 (9th Cir. 1987) (court held it had no jurisdiction to review this suspension of further grants).

[16] The ALJ also determined, in response to prehearing motions, "that the proper test for compliance with Assurance No. 20 must be the same as the test for compliance with Federal statutes and case law," noting that "[if] the test under Assurance No. 20 . . . were not the same, the Administrator would have *carte blanche* to override the effect of the Federal Statutes and case law by different interpretation of the grant agreements." R.131 at 10 & n.6.

[17] Indeed, Burlington's witness testified on cross-examination that if Burlington were not able to use the Q707, the most likely replacements would be the B-757 and the DC-70 series aircraft, both of which are Stage 3 and (according to FAA testimony) significantly quieter than the Q707. R.283 at 23-24 (Burlington witness); R.365 at 654-58 (FAA witness).

ing San Francisco's determination that granting Burlington a waiver to operate the Q707 at SFIA would undermine its noise abatement policy and result in the influx of a large number of new Stage 2 aircraft, which in turn would increase SFIA's noise impact area and increase San Francisco's exposure to nuisance liability.[18]

Instead, the principal fact the FAA sought to prove at the hearing was that, contrary to the finding of the Commission, some aircraft models that have operated at SFIA since January 1, 1985 are as loud or louder than the Q707.[19] The FAA proved this fact by introducing into evidence proprietary noise data that had not been submitted during the Airports Commission hearing process. Further, the FAA succeeded in refuting the publicly available data upon which the Airports Commission had relied by uncovering a previously unknown error in an FAA-sponsored study of the noise characteristics of B-707s.

In written briefs and arguments to the ALJ, San Francisco presented two principal legal contentions: First, San Francisco contended that the FAA's claim of unjust discrimination can not be upheld, under the existing case law, unless it can be determined that San Francisco did not have a rational or reasonable basis to believe its 1978 Regulation would reduce the noise impacts of SFIA or the potential noise liability of San Francisco. Judged under such a standard, the 1978 Regulation and San Francisco's actions with respect to the Q707 would clearly have to be upheld. Second, San Francisco contended that the FAA

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[18] Over 127 B-707s and 135 DC-8s had been retrofitted by the time of the hearing. R.324 at 27-28. Miami International Airport, which is a gateway airport somewhat smaller than SFIA that did not restrict retrofits, had 256 weekly operations of retrofitted Q707s and DC-8s. R.324 at 28-29; R.325 at Exhibit 10.

[19] ALJ Kane and the FAA Decision refer to 15 such aircraft models. However, 9 of these aircraft have not operated at SFIA since January 1, 1985. App., *infra*, 66a-67a; R.318 at 41-42.

did not have the power under the grant agreements to find San Francisco in default on the basis of a review and redetermination by the FAA of an otherwise final adjudicatory determination of the Airports Commission, at least where Commission procedures had been fair and reasonable. Thus, the FAA could not rely, in its determination of default, upon a determination that at full weight, full power takeoff the Q707 was not as noisy as the Commission had determined, especially since full power Q707 noise data had not been submitted by the FAA or Burlington during the Airports Commission hearing process.[20]

E. The Opinions of the ALJ and of the FAA Administrator

The ALJ on August 9, 1988 issued an initial decision finding San Francisco in default under its ADAP grants. The ALJ reaffirmed that he was determining default "as though this case were being brought before a federal court and as though no grant agreement were in existence," app., *infra*, 71a.[21] The ALJ went on, however, to reject San Francisco's rational basis test and the cases on which it relied and further rejected San Francisco's contention that it could "ratchet down" noise by setting a deadline for noisy aircraft, grandfathering those aircraft that met the deadline and excluding those that failed to meet the

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[20] Under order of the ALJ, the noise data on the Q707 was finally provided San Francisco's outside counsel some twenty months after the Airports Commission's decision. Over the Commission's objection, the ALJ ordered that no member of the Airports Commission or of the Commission staff could see the Q707 noise data. To this date, the Commission has not seen the data that "disproves" the finding challenged by the FAA.

[21] "It is concluded, therefore, that any discrimination which the Commission is prohibited by the Federal Statute and case law from practicing is likewise prohibited by Assurance No. 20 of the grant agreements. Similarly, any discrimination which the Federal Statutes and case law permits is permitted by Assurance No. 20." App., *infra*, 73a.

deadline. For the ALJ, the decision turned on the fact that grandfathered aircraft that were noisier than the Q707 were permitted to operate at SFIA while the Q707 could not operate because it failed to meet the regulatory deadline.

The ALJ also specifically rejected San Francisco's procedural argument. Even though the FAA and Burlington never gave full-weight, full-thrust noise data to the Commission at its hearing, the ALJ nevertheless made the extraordinary finding that it was "irrational" of the Commission to reject the FAA's bald assertion that the Q707 was not the noisiest aircraft operating at SFIA. The ALJ conceded that "[t]he Commission was clearly confronted with severe restrictions on its access to the information underlying the noise certification of the Q707 at full power and maximum takeoff weight during the period when it was deciding to exclude the airplane." App., *infra*, 85a. The ALJ, nevertheless, found that the Commission was not rationally entitled to treat FAA testimony about the noise level of the Q707 as "just another piece of data," not entitled to more credence than any other evidence being received by the Commission. The ALJ never responded directly to the Commission's contention that San Francisco never agreed, as part of its grant agreements, to permit the FAA to determine the issue of default on the basis of a review and redetermination of the Commission's final adjudicatory determination.

On appeal, the FAA Administrator affirmed, finding San Francisco in default under the ADAP grant agreements because San Francisco had permitted six "grandfathered" aircraft models noisier than the Q707 to operate at SFIA after January 1, 1985 while excluding the Q707. While acknowledging that a finding of default must be determined by "application of appropriate decisional law," app., *infra*, 51a,[22] the FAA Administrator expressly rejected San

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[22] The FAA Administrator conceded that this was "a case of first

Francisco's argument, based on numerous decisions of this Court, that its noise abatement regulation must be upheld so long as San Francisco had a rational or reasonable basis for concluding that the 1978 Regulation would contribute to the objective of controlling cumulative noise from SFIA, app., *infra*, 48a-49a.

The FAA Administrator's decision never questioned the uncontested evidence that admission of the Q707 would increase the noise impact of SFIA nor the evidence that the noise impact area of SFIA had been decreasing substantially after the 1985 deadline. Similarly, it was not disputed that, on the basis of the FAA's noise data, the Q707 was noisier than all but six aircraft types operating at SFIA and noisier than 98.5% of all aircraft operations at SFIA.

The FAA Administrator also rejected San Francisco's argument that there was no legal basis for finding a default on the basis of evidence that was unavailable to the Commission, concluding that: "[T]he question of the accuracy or completeness of submissions by parties to the Commission during the waiver process are [sic] irrelevant, as are the specific fact findings associated with the waiver process." App., *infra*, 51a, n.19. The FAA Administrator did not question the ALJ's finding that the Commission had been denied noise data on the Q707 at the time of its hearing on the waiver application. The FAA Administrator also never set forth his legal basis for concluding that the airport grant agreements permitted him to find San Francisco in default on the basis of facts that were not available when the Commission acted.[23]

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impression." App., infra, 44a. No prior FAA administrative proceeding or court decision had ever interpreted the grant assurance.

[23] The FAA Administrator also denied San Francisco's motion for reconsideration, app., *infra*, 101a.

F. The Opinion of the Court of Appeals

The court of appeals affirmed the Administrator's Decision and Final Order of Noncompliance and Default on the basis of the FAA Administrator's finding that San Francisco's noise regulation allowed planes that were equally noisy or noisier than the Q707 to operate at SFIA. The court of appeals concluded that "it was not unreasonable for the FAA to interpret the statute as requiring more than that San Francisco's regulation reduce noise," app., *infra*, 17a, although the court of appeals (like the FAA) never explicitly sets forth what higher standard San Francisco's regulation was required to meet. The court of appeals explicitly rejected San Francisco's contention that its regulation must be upheld if it had a rational or reasonable basis for believing that its actions would decrease noise or potential noise liability and, further, explicitly rejected San Francisco's contention that its 1978 Regulation is a lawful exercise in "grandfathering" under *City of New Orleans v. Dukes*, 427 U.S. 297 (1978), app., *infra*, 17a-18a.[24]

In reaching its conclusion, the court of appeals mistakenly assumed that it was reviewing for reasonableness an independent construction by the FAA Administrator of 49 U.S.C. app. 2210(a)(1), even though the case had been tried and decided by the FAA on the basis that the grant assurance required nothing more than what is already re-

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[24] The court of appeals questioned whether grandfathering was occurring under the 1978 Regulation since the regulation grandfathered airplane types and not individual planes. The court of appeals conjectured that takeoffs and landings of noisier aircraft than the Q707 could be increasing. In fact, operations by the six noisier aircraft had been declining. In any event, numerous lawful grandfathering schemes operate in the same manner as the 1978 Regulation. Indeed, the court of appeals referenced one such scheme. *See Western Air Lines v. Port Auth. of N.Y. & N.J.*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd* 817 F.2d 222 (2d Cir. 1987) *cert. denied sub nom., Delta Air Lines v. Port Auth. of N.Y. & N.J.*, 485 U.S. 1006 (1988).

quired of San Francisco under applicable decisional law. The court of appeals also found it of no consequence that admission of the Q707 alone or the opening of SFIA to other aircraft that had not met the January 1, 1985 deadline would increase the noise impacts of SFIA upon its surrounding communities, app., *infra*, 17a.

The court of appeals did not explicitly reject San Francisco's contention that the FAA had no legal authority to base a finding of default on the basis of a *de novo* review and redetermination of the Commission's April 15, 1986 adjudicatory determination.[25] Nevertheless, by relying upon the Q707 noise data as the factual basis for its decision upholding the FAA, the court of appeals was clearly rejecting San Francisco's contention, app., *infra*, 7a-8a.[26]

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[25] Because the court of appeals decision does not deal explicitly with this issue, we reproduced in the Appendix the relevant portion of the brief to the court of appeals, app., *infra*, 131a.

[26] San Francisco submitted out of time a petition for rehearing and suggestion for rehearing *en banc* shortly after the court of appeals issued the decision in *Alaska Airlines v. City of Long Beach*, Nos. 88-67745, 89-55278 (9th Cir. October 24, 1991) (*"Alaska Airlines"*). The petition was based upon a conflict between the decision in this case and the decision in *Alaska Airlines*. The court of appeals denied permission to file the petition out of time, app., *infra*, 25a.

REASONS FOR GRANTING THE WRIT

A. The Question of Whether a Federal Grantee Can be Found in Default Under Its Grants on the Basis of a Redetermination of Its Otherwise Final Adjudicatory Determinations, Where the Grant Statutes and Regulations are Silent on the Issue, Implicates Important Issues of Federalism and of Limits on the Spending Power and Should Be Decided By This Court.

This petition raises the substantial and recurring question of the relationship between the Federal Government and the States and local governments when a dispute arises under a federal-state or local grant program. This case involves one of the largest of these grant programs, the program under which airport proprietors receive grants for the construction, repair, and improvement of airport and airway facilities and for certain noise abatement projects.[27] As is the case with other federal-state or local grant programs, the governmental airport proprietor enters into a grant agreement with the federal agency administering the program, in this case the FAA, and thereby agrees to comply with various grant assurances or conditions contained in the agreement.

The FAA asserted in this case the power to determine default under the grant assurance on the basis of its independent fact-finding process by which the FAA would determine facts and reach conclusions based on those facts without any deference whatsoever to the local governmental process.[28] San Francisco, in the 1978 Noise Abate-

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[27] *See* Airport and Airway Improvement Act, 49 U.S.C. app. 2201 *et seq.*

[28] These facts upon which the FAA relied in determining default have still not been made available to the San Francisco Airports Commission. The noise data on the Q707 were disclosed to San Francisco's outside legal counsel under a protective order which prohibits disclosure to any

ment Regulation, established a fair and reasonable fact-finding process whereby an operator seeking a waiver from the Regulation was given the right to an adjudicatory hearing before the Airports Commission. Burlington exercised its right to a hearing, in which the FAA and members of the public also participated.[29] No participant has contended that the Commission's conduct of the hearing was not fair, reasonable and in accordance with California law.[30]

San Francisco had no notice when it signed the airport grant agreements that it had given up important aspects of its sovereignty, by which it was free to make regulatory decisions by means of fair and reasonable procedures and by which it was free to reach rational conclusions from the facts found by means of those procedures. Not only had the San Francisco decisional process been in place since 1978 before many of the relevant grants had been signed, but the grants contained no language, explicit or otherwise, to suggest that they empowered the grant-administering agency to supplant the administrative processes of the governmental airport proprietor.[31]

San Francisco official. San Francisco was unsuccessful in getting the ALJ's protective order modified to permit disclosure of the noise data under protective order to the Airports Director and the Airports General Counsel.

[29] Burlington participated in the hearing through the submission of written and oral evidence. The FAA, although present at the hearing, participated only through the submission of written evidence.

[30] Under California law, the Airports Commission acted as an adjudicatory body when it held the noticed hearing on March 18, 1986. At the hearing, the Airports Commission received written and oral testimony, oral testimony was transcribed, written testimony was placed in a formal record, and the Commission prepared a written decision based on the record before it. As a result, the Commission's factual findings have binding and preclusive collateral estoppel effect under California law. *People v. Sims*, 32 Cal. 3d, 468, 477-479, 186 Cal. Rptr. 77, 82-85, 651 P.2d 321, 325-28 (1982).

[31] Neither had the FAA adopted regulations or published policies which stated that the FAA intended to supplant grantee administrative de-

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), this Court emphasized the voluntary, consensual and contractual nature of grant programs:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."

451 U.S. at 17; *see also Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 596, *cert. denied*, 463 U.S. 1228 (1983) (plurality opinion of White, J.) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt."); *Hendrick Hudson District Board of Education v. Rawley*, 458 U.S. 176, 204 n.26 (1982).

This Court has also stated in *Pennhurst* and in cases decided thereafter that Congress must express its intent to impose conditions on federal grant funds "clearly," "unambiguously," and "with a clear voice," so that grant recipients "can knowingly decide whether or not to accept those funds." *Pennhurst*, 451 U.S. at 17, 24; *see also Grove City College v. Bell*, 465 U.S. 555, 575 (1984) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *see also School Board of Nassau County v. Arline*, 480 U.S. 273, 289 (1987) (Rehnquist, C.J., dissenting).

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terminations for purposes of determining a default under the airports grants program.

These constraints on grant programs derive not only from limits on the spending power but also reflect important federalism considerations. Because the power of Congress to legislate in areas traditionally regulated by the States "is an extraordinary power in a federalist system," it is a power that this Court "must assume Congress does not exercise lightly." *Gregory v. Ashcroft,* 111 S.Ct. 2395, 2400 (1991). As a result, this Court has imposed "the requirement of clear statement" on Congress, so that the Court is assured that the Congress has clearly and manifestly intended to preempt state or local legislative judgments. *Will v. Michigan Dept. of State Police,* 109 S.Ct. 2304, 2308 (1989).

When this Court has in the past considered the relationship between state or local administrative processes and federal fact-finding, this Court has upheld the preclusive effect of fair and reasonable state or local administrative processes, unless Congress has clearly manifested its intent to permit federal review or redetermination. *University of Tennessee v. Elliott,* 478 U.S. 788 (1986). This court has repeatedly stated that principles of federalism and comity require deference to, and not interference with, the lawful processes of state and local administrative agencies. *University of Tenn.,* 478 U.S. at 796-99; *Ohio Civil Rights Comm'n. v. Dayton Christian Schools, Inc.,* 477 U.S. 619, 627-29 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423 (1982).

The airport grant program, like other federal-state or local government grant programs, was clearly enacted by Congress under the spending power for the purpose of providing financial assistance to grantees for specified categories of projects. Congress was not purporting to adopt a regulatory program pursuant to its Commerce Clause powers and was certainly not purporting to prescribe the procedures to be used by local airports when adopting or enforcing noise abatement measures. Congress clearly knew how to prescribe the procedures to be used by local

airport proprietors, when it wished to do so. *See* Airport Noise and Capacity Act of 1990, Section 9304, 49 U.S.C. App. 2153.

Both the court of appeals and the FAA rejected San Francisco's contention that it had never received clear and unambiguous notice that that its fair and reasonable administrative process would be entirely supplanted by an FAA fact-finding process under which the FAA could review and redetermine final adjudicatory determinations of the Commission. As a result, San Francisco never had notice that it could be found in default on the basis of facts which were never available to it when it made the decision which allegedly constituted the default. If the FAA's position is not overturned, grantees could find themselves in default on the basis of facts and circumstances of which they had no possible knowledge and indeed despite, as in this case, a fair and reasonable procedure for gathering the relevant facts at the time of the alleged default.

Even were San Francisco's position to be upheld, Congress or a grant-administering agency possessing appropriate statutory authority would have the power to provide for *de novo* review and redetermination of grantees' adjudicatory determinations, provided the grantee was provided a clear and unambiguous notice of that fact at the time it entered into the grant. When an agency provides such advance notice to grantees, political constraints or the refusal of grantees to participate in the grant program would serve as a check on the grant-administering agency.

Whether the FAA has authority to review state or local agency adjudicatory determinations, at least where the state or local agency has engaged in a fair and reasonable administrative process, is clearly of decisive importance to this case.[32] Both the FAA Administrator's Decision and

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[32] With the passage of San Francisco's 1988 Noise Abatement Reg-

the court of appeals decision is based upon the finding that aircraft are noisier than the Q707 at full power and maximum takeoff weight. There is no dispute, and the ALJ expressly found, that the Airports Commission did not have access to Q707 proprietary noise data at the time of its waiver decision, app., *infra*, 85a. Indeed, the Q707 noise data was only made available by order of the ALJ to San Francisco's outside counsel twenty months *after* the waiver denial. Further, the FAA itself first detected an error in the publicly available data upon which the Airports Commission relied in its waiver decision—an FAA-sponsored study—a full two years after the waiver denial. Therefore, a finding that the FAA did not have the authority to review and redetermine *de novo* the adjudicatory determinations of the Airports Commission would necessitate a reversal of the FAA Administrator's determination and a remand under which any FAA default determination could not involve redetermination of the Airports Commission's adjudicatory determination.[33]

For the foregoing reasons, San Francisco respectfully suggests that this issue raises important federalism and Spending Clause issues that require resolution by this Court.

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ulation, Burlington was invited to apply for a variance to operate at SFIA. The Commission stated that any Burlington variance application would be decided "fairly and without any pre-conceived outcome" by an independent hearing officer. R.319 at Exhibits 15, 17. The Airports Commission has, thus, not had an opportunity to consider the Q707 noise data upon which the FAA relied.

[33] The FAA would, thus, function much the way this Court functions in reviewing decisions of state courts. Except in certain narrow circumstances, this Court does not review and redetermine issues of fact or questions of state law determined by state courts.

B. The Scope of Airport Proprietor Power to Control Noise From Airport Operations Is of Great Public Importance and Only This Court Can Resolve the Conflict of the Lower Courts on the Scope of This Power.

The scope of the authority of an airport proprietor to take action to control the noise from airport operations is an issue of overwhelming public importance over which the lower courts are in clear disarray. According to the FAA, in 1990 an estimated 2.7 million individuals were within the 65 DNLdB noise contours around the nation's airports. Transition to an All Stage 3 Fleet Operating in the 48 Contiguous United States and the District of Columbia, 56 Fed. Reg. 48,628, 48,652 (1991).[34] Virtually all major airports have adopted noise abatement measures, the nature and form of which vary widely.[35] These airport proprietor noise abatement measures have been challenged in a substantial number of cases in the eighteen years since this Court's decision in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973).[36]

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[34] The 65 DNLdB is a measure of sound level used by the FAA, in which the 24-hour average sound level is obtained after the addition of ten decibels to sound levels for periods between 2200 and 700 local time. *See* Airport Noise Compatibility Planning, 14 C.F.R. Part 150 (1991).

[35] Noise abatement measures are in effect at 147 airports in the United States. 1991 Airport Noise Summary, National Business Aircraft Association, Inc.

[36] *See e.g., Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J.*, 731 F.2d 127 (2d Cir. 1984); *Global Int'l Airways Corp. v. Port Auth. of N.Y. & N.J.*, 727 F.2d 246 (2d Cir. 1984); *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983); *British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 564 F.2d 1002 (2d Cir. 1977); *British Airways Bd. v. Port Auth. of N.Y. & N.J.*, 558 F.2d 75 (2d Cir. 1977); *Rosenbalm Aviation, Inc. v. Port Auth. of N.Y. & N.J.*, 636 F. Supp. 212 (S.D.N.Y. 1986); *Arrow Air, Inc. v. Port Auth. of N.Y.*, 602 F. Supp. 314 (S.D.N.Y. 1985); *National Aviation v. City of Hayward, Cal.*, 418 F. Supp. 417 (N.D. Cal. 1976); *Air Transport Ass'n. of Am. v. Crotti*, 309 F. Supp.

The courts that have been called upon to review the lawfulness of these noise abatement regulations, where they have articulated standards of review at all, have adopted standards which range from the rational or reasonable basis test advocated by San Francisco,[37] to one which virtually impose a *per se* ban on certain forms of noise abatement regulation.[38]

Moreover, several state courts have imposed nuisance or tort law liability upon airport proprietors for their failure to undertake noise abatement activities.[39] These cases have effectively laid down a requirement that airport proprietors adopt any measures that could feasibly lessen the noise impacts on surrounding residents.[40] Indeed, San

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58 (N.D. Cal. 1975); *Harrison v. Schwartz*, 319 Md. 360, 572 A.2d 528 (1990); *Hanover Tp. v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969).

[37] *E.g., Santa Monica Airport Ass'n City of Santa Monica*, 659 F.2d 100, 104, n.5 (9th Cir. 1981) (Airport proprietor should be allowed to enact noise ordinances "if it has a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of the city's human environment."); *Global Int'l Airways Corp. v. Port Auth.*, 727 F.2d at 251 ("[T]he reasonable prospect of a beneficial effect is sufficient" to uphold the Port Authority's noise regulation.) *Arrow Air, Inc. v. Port Auth. of N.Y.*, 602 F. Supp. at 319-320 (S.D.N.Y. 1985) (reasonableness and discrimination determined based on standard in *City of New Orleans v. Dukes.*)

[38] *E.g., Pirolo v. City of Clearwater, supra; Harrison v. Schwartz, supra; Hanover Tp. v. Town of Morristown, supra.*

[39] *See, e.g., Northeast Phoenix Homeowners' Ass'n v. Scottsdale Municipal Airport*, 130 Ariz. 487, 636 P.2d 1269 (1981); *Baker, supra; Greater Westchester, supra; Owen v. City of Atlanta*, 157 Ga. App. 365, 277 S.E.2d 338, *aff'd*, 248 Ga. 299, 282 S.E.2d 906 (1981), *cert. denied*, 456 U.S. 972 (1982); *Ursin v. New Orleans Aviation Bd.*, 506 So.2d 947 (La. App. 5th Cir. 1987); *Krueger v. Mitchell*, 112 Wis. 2d 88, 101, 332 N.W.2d 733, 739 (1983).

[40] The Solicitor General argued in an *amicus curiae* brief in opposition to the grant of certiorari in the *Greater Westchester* case that an airport proprietor's state common law nuisance liability for noise is *not*

Francisco was found liable in nuisance on just such a theory. *See* p.3, *supra*. The Seventh Circuit recently held that the common law remedies of Illinois for airport noise and pollution have not been preempted by federal law. The Court reasoned that if *Burbank* allowed the state some role in governing noise from its airports, the state can choose to exercise that role through its state courts. *Bieneman v. City of Chicago*, 864 F.2d 463, 470-72 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989). Local airport proprietors are literally caught between the Scylla of varying and uncertain constraints on their authority to adopt noise abatement measures and the Charybdis of nuisance or tort liability if they fail to take all effective action to control noise.

The "[c]ontrol of noise is of course deep-seated in the police powers of the States," *City of Burbank v. Lockheed Air Terminal*, 411 U.S. at 638, as is the control of other threats to the quality of the environment. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). Despite the absence of any explicit preemption of state or local authority over control of the noise from airport operations in prior federal legislation,[41] this Court in *Burbank* held

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preempted by federal law. *Amicus Curiae* In Opposition to Petition for Certiorari, *City of Los Angeles v. Westchester Homeowners Ass'n*, 449 U.S. 820 (1980) (No. 79-1406).

[41] Indeed, the committee reports on the 1968 and 1972 federal aviation legislation relied upon by the *Burbank* majority stated that the legislation was not intended "to effect any change in the existing apportionment of powers between the Federal and State and local governments." S. Rep. No. 1353, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2688, 2693. Similar statements appear in the House and Senate Reports on the Noise Control Act of 1972. H.R. Rep. No. 842, 92d Cong. 2d Sess. (1972); S. Rep. No. 1160, 92d Cong., 2d Sess. 10-11, *reprinted in* 1972 U.S.C.C.A.N. 4655, 4663-64. The latter statements are quoted in *Burbank*, 411 U.S. at 634. San Francisco believes that the dissent in *Burbank*, concluding that there was no implied preemption of local noise abatement authority, represented the better view of the law. *See Burbank*, 411 U.S. at 640-654 (Rehn-

that a municipality acting in its governmental capacity was prohibited from adopting a curfew on jet flights into an airport located within its boundaries. However, this Court left open the possibility that such a regulation could be adopted by a municipality acting in its capacity as an airport proprietor. *Burbank*, 411 U.S. at 635-36 n.14.

Subsequent to *Burbank*, all courts that have considered the question have upheld the authority of an airport proprietor to take action to limit the noise impact of airport operations although the courts have differed widely as to the scope of that authority. In the proceedings before the FAA and the court of appeals, San Francisco relied upon the standard that had been enunciated by the Ninth Circuit in 1981: "[The airport proprietor] should be allowed to define the threshold of its liability, and to enact noise ordinances under the municipal proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability or enhance the quality of the city's human environment." *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 n.5 (9th Cir. 1981). This standard was recently reaffirmed by a different panel of the Ninth Circuit than that which considered this case. *Alaska Airlines v. City of Long Beach*, slip op. at 14547. On facts analogous to those presented by San Francisco's noise abatement rules, the federal courts in New York upheld an airport proprietor rule "grandfathering" nonstop flights from Denver into LaGuardia Airport even though the rule contained no cap on the number of "grandfathered" flights allowed to operate along the route. *Western Air Lines v. Port Authority of N.Y. & N.J.*, 658 F.Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

Both the FAA and the court of appeals clearly rejected the standard being advocated by San Francisco without

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quist, J., dissenting). In view of events since 1973, it may now be appropriate for the Court to revisit its holding in *Burbank*.

articulating an alternative standard which would define when an airport proprietor's noise abatement regulation was not "fair and reasonable" or constituted "unjust discrimination." To the extent the court of appeals enunciated a standard at all, the standard was a vague one as to whether the noise abatement regulation is "inconsistent with a fair and efficient national air transportation system," app., *infra*, 16a. The FAA and the court of appeals also rejected San Francisco's reliance upon cases in which this Court has been asked to determine, under the Equal Protection Clause, whether local economic regulation is unfair or unjustly discriminatory.

As this Court has articulated the test it has adopted under the Equal Protection Clause, there can be little doubt that San Francisco's 1978 Noise Abatement Regulation would be upheld. San Francisco had an entirely adequate basis for concluding that a long-noticed deadline on new Stage 2 entrants at SFIA, especially as part of a policy which called for the phased elimination of all Stage 2 aircraft, would control airport noise by excluding a noisy class of aircraft and by encouraging a shift to the less noisy Stage 3 aircraft. Under this Court's rational or reasonable basis test, it would hardly be irrelevant, as the FAA and court of appeals found, that even on the FAA's noise data the Q707 was noisier than all but a handful of aircraft operating at SFIA, amounting to just 1.5% of SFIA's operations, and that admission of the Q707 could lead to the admission of hundreds of equally noisy Stage 2 aircraft retrofitted after January 1, 1985.

Under the Equal Protection Clause, where a local economic classification is challenged as discriminatory courts must "presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Governmental bodies are *not* required to convince courts of the correctness of their legislative judgments. Instead,

"those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Those challenging governmental action "cannot prevail so long as 'it is evident from all the considerations . . . that the question is at least debatable.' " *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (*quoting United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938)). Moreover, state regulatory bodies "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . [and] may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955).

Although the FAA Administrator asserted that "the Commission's noise control regulation *implicated* both the Supremacy Clause and the Commerce Clause," app., *infra*, 49a, (emphasis supplied), the FAA staff never alleged, much less did the FAA Administrator actually find, that San Francisco's noise abatement regulation constituted a burden on interstate commerce or that it was otherwise preempted by federal law. Neither the FAA nor the court of appeals was prepared to hold that San Francisco's noise abatement ordinance, which applies equally to interstate and intrastate flights, violated the Commerce Clause. Indeed, the Ninth Circuit in *Alaska Airways* upheld the Long Beach noise abatement regulation against a Commerce Clause attack, applying a standard under which "the ordinance would violate the commerce clause only if the particular means chosen to achieve its goals were irrational, arbitrary or unrelated to these [noise abatement] goals." *Alaska Airways*, slip op. at 14551.[42]

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[42] Under this Court's decisions under the dormant Commerce Clause, this Court has held that where a state or local agency "[is] legislating

Given the varying and uncertain standards adopted by the lower courts on the scope of an airport's proprietors noise abatement authority, only this Court is in a position to end the disarray and adopt a uniform standard. While Congress last year adopted certain procedural requirements before an airport proprietor can adopt a restriction on Stage 2 aircraft, Congress expressly provided that "nothing in this subtitle shall be deemed to eliminate, invalidate, or supersede—(1) existing law with respect to airport noise or access restrictions by local authorities." Airport Noise and Capacity Act of 1990, Section 9304(h), 49 U.S.C. app. 2153(h). Controversies as to scope of airport proprietor noise authority will, thus, continue under the recent legislation.

Moreover, because of the complete record in this case and the extensive arguments and opinions below, this case represents an especially appropriate vehicle to resolve the appropriate scope of the airport proprietary noise abatement authority.

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in areas of legitimate local concern, such as environmental protection . . . [and where] a statute regulates 'evenhandedly' and imposes only 'incidental' burdens on interstate commerce," the local regulation cannot be struck down unless " 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' " *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 471, *quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In this case the FAA never made findings as to the "local benefits" of the 1978 Regulation and, indeed, the ALJ excluded evidence which San Francisco sought to introduce demonstrating the substantial noise benefits of the regulation. The record was, therefore, inadequate to make a Commerce Clause finding.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO; THE AIRPORTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, *Petitioners,* v. FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD, *Respondents.*	No. 89-70055 FAA No. 1386-2 OPINION

COUNTY OF SAN MATEO, *Petitioner,* v. FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD, *Respondents.*	No. 89-70053 FAA No. 1386-2

CITY AND COUNTY OF SAN FRANCISCO; THE AIRPORTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, *Petitioners,* v. FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD, *Respondents,* BURLINGTON AIR EXPRESS ("BURLINGTON"), *Respondent-Intervenor.*	No. 89-70057 FAA No. 1386-2
CITY AND COUNTY OF SAN FRANCISCO; THE AIRPORTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, *Petitioners,* v. FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD, *Respondents.*	No. 89-70482 FAA No. 1386-2

CITY AND COUNTY OF SAN FRANCISCO; THE AIRPORTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD,
Respondents.

No. 89-70483
FAA No. 1386-2

COUNTY OF SAN MATEO,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD,
Respondents.

No. 89-70500
FAA No. 1386-2

Petition to Review a Decision of the Federal Aviation Administration

Argued and Submitted
November 5, 1990—San Francisco, California

Filed August 21, 1991

Before: James R. Browning, Harry Pregerson and Stephen S. Trott, Circuit Judges.

Opinion by Judge Browning

SUMMARY

Administrative Law

Affirming in part and reversing in part a decision of the Federal Aviation Administration, the court of appeals held that San Francisco's ban of certain aircraft from its airport unjustly discriminated against the aircraft in violation of its grant assurance.

The FAA denied petitioner City and County of San Francisco airport improvement grants from the Airport and Airway Trust Fund. To receive funds, an airport proprietor must submit a grant application to the Secretary of Transportation assuring the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination. San Francisco submitted grant applications for fiscal years 1986 through 1989. The FAA rejected the applications on the ground San Francisco had violated the assurance of nondiscrimination by unjustly discriminating against a retrofitted aircraft through a noise abatement resolution. Such regulation prohibited such aircraft from continuing operations at the Airport. An ALJ determined that San Francisco had breached its assurance that it would operate the Airport without unjust discrimination. The FAA affirmed.

[1] At the outset, the court rejected San Francisco's contention that the court should decide de novo as a matter of contract interpretation whether San Francisco violated its grant assurance. This contention misunderstood the nature of federal regulation of airport noise. [2] The court noted that the federal government regulates aircraft and airspace pervasively, preempting regulation of aircraft noise by state or local governments. [3] The power delegated to airport proprietors to adopt noise control regulations is limited to regulations that are not unjustly discriminatory. [4] Courts have recognized both the delegation of regulatory power to airport proprietors

and the limitation of this power to the issuance of nondiscriminatory regulations. [5] Grants must be offered upon terms and conditions the Secretary of Transportation considers necessary to meet the requirements of the statute, and a grant application may not be approved unless the Secretary is satisfied that regulatory and statutory requirements have been met.

[6] The court accorded substantial deference to the interpretation adopted by the agency charged with administering the statute. Deference was especially appropriate because Congress expressly mandated FAA enforcement of the statute by the Secretary, and application of the statute to airport noise regulations requires technical expertise. [7] Here, the FAA approved the ALJ's holding that because San Francisco's noise regulation allowed planes that were equally noisy or noisier to operate at the airport and increase in number without limit, while excluding the aircraft at issue based on a characteristic that had no bearing on noise, the regulation violated the statutory requirement and grant assurance that the airport would be available without unjust discrimination. [8] The court agreed with the FAA. The central issue was whether San Francisco's regulation was unjustly discriminatory within the meaning of the statute, and the Second Circuit's *Concorde Cases* were sound authority for the conclusion that it was. [9] In this case, use of noise control regulations by an airport proprietor to bar aircraft on a basis other than noise, or without a factual basis, was found to be inconsistent with a fair and efficient national air transport system. This test of "unjust discrimination" was a permissible construction of the statutory language and the policy it serves. [10] The court rejected San Francisco's suggestion that a state contract defense could authorize it to adopt a noise regulation prohibited by federal law. [11] San Francisco argued Burlington failed to exhaust its administrative remedies by not seeking a waiver of the 1988 regulation. However, the FAA correctly concluded that such an application would have been futile.

[12] In 1987, Congress imposed a 180-day limit on the time the FAA could take to consider airport improvement grant

applications. [13] The statutory language is mandatory, leaving the FAA no discretion. It compels timely approval or denial of grant applications. [14] The FAA argued the statute did not apply retroactively and so did not compel approval of grants for the years 1986 and 1987. San Francisco agreed, but noted it refiled the grant applications for these years after the statute was amended. The FAA pointed to no bar to refiling applications for previous years. The court therefore held the refiled applications were subject to the 180-day limitation period in the same way as newly filed ones. Therefore, the FAA was directed to approve San Francisco's applications for those years. [15] It was not an abuse of the district court's discretion in denying San Mateo County (where the airport is located) more than limited intervention.

COUNSEL

Steven S. Rosenthal, Morrison & Foerster, Washington, D.C., for the petitioners. Porter Goltz, Deputy County Counsel, County of San Mateo, Redwood City, California, for the petitioners.

John A. Bryson, United States Department of Justice, Washington, D.C., for the respondents.

John W. Simpson, Kelley Drye & Warren, Washington, D.C., for the intervenor.

Kenneth R. Williams, Deputy Attorney General, and Larry A. Thelen, Department of Transportation, Sacramento, California, for the amicus.

OPINION

BROWNING, Circuit Judge:

The City and County of San Francisco petitions for review of a decision of the Federal Aviation Administration (FAA)

denying San Francisco's applications for airport improvement grants from the Airport and Airway Trust Fund. We affirm in part and reverse in part.

I

The Airport and Airway Trust Fund is made up of amounts equivalent to taxes on aviation fuel and air transportation received by the Treasury. *See* 26 U.S.C. § 9502 (1988). Money from the Trust Fund is allocated, pursuant to The Airport and Airway Improvement Act of 1982, 49 U.S.C. app. §§ 2201-27 (1988), to finance the operation and improvement of major airports. Potential recipients include "primary airports" like San Francisco International Airport. *See* 49 U.S.C. app. §§ 2202(a)(12), 2205(a)(2)(B).

To receive funds from the Trust Fund, an airport proprietor must submit a grant application to the Secretary of Transportation assuring the "airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination. . . ." 49 U.S.C. app. § 2210(a)(1). San Francisco submitted grant applications for fiscal years 1986 through 1989. The FAA rejected the applications on the ground San Francisco had violated the assurance of nondiscrimination by unjustly discriminating against a retrofitted Boeing 707 airplane (Q707) through a Noise Abatement Resolution adopted by San Francisco's Airports Commission in 1978 ("1978 Regulation").

The FAA establishes standards for aircraft noise levels through a certification system. *See* 49 U.S.C. §§ 1423, 1431. Aircraft are certified as Stage 1 (not allowed to operate in the U.S. after 1985), Stage 2, and Stage 3 (most quiet) based on the decibels they emit. *See* 14 C.F.R. Part 36 (1991). Stage 1 aircraft may be retrofitted to meet Stage 2 standards; the Q707 involved in this case is such a retrofitted Stage 1 aircraft.

San Francisco's 1978 Regulation prohibited aircraft from continuing operations at the Airport after January 1, 1985

unless certified as Stage 2 (or Stage 3) or retrofitted to meet Stage 2 certification requirements. Aircraft like the Q707 that had been retrofitted to meet Stage 2 certification requirements could begin operations at the Airport after January 1, 1985, only if the FAA had certified at least one plane of the same type as meeting Stage 2 requirements before January 1, 1985. Because FAA regulations required Stage 3 certification for new aircraft after November 1975, the practical effect of San Francisco's regulation was that only Stage 3 aircraft and "grandfathered" Stage 2 aircraft were allowed to operate at the Airport after January 1, 1985.

Burlington Air Express, an all-cargo carrier, applied to the San Francisco Airports Commission in August 1985 for a waiver of the 1978 Regulation so it could operate several retrofitted Q707s at the Airport. These planes received Stage 2 certification from the FAA in March 1985, three months after San Francisco's cutoff date of January 1, 1985. Burlington's waiver application was denied. Since the denial, Burlington has operated its Q707s from Oakland Airport across San Francisco Bay.

While Burlington's waiver request was pending before the Commission, Burlington filed a complaint with the FAA. The FAA's Chief Counsel issued a Notice of Proposed Cease and Desist Order, alleging exclusion of Burlington's Q707 aircraft was unjustly discriminatory in violation of section 2210(a)(1) and San Francisco's grant assurance.[1] The notice suspended airport improvement grants to San Francisco.

After a hearing, a Department of Transportation Administrative Law Judge held San Francisco had breached its assurance that it would operate the Airport without unjust discrimination. The Administrator of the FAA affirmed, holding the 1978 Regulation unjustly discriminatory because it

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[1]The Chief Counsel alleged the exclusion violated other statutes, but these charges were later dismissed.

allowed planes that were equally noisy or noisier than Q707s to operate at the Airport and to increase in number without limit while excluding the Q707, based on a characteristic — date of type-certification as meeting Stage 2 requirements — that had no relationship to noise. The FAA denied San Francisco's grant applications and withheld approval of new grants while the regulation remained in effect. San Francisco petitioned for review in this court.

II

[1] We reject at the outset San Francisco's contention we should decide de novo as a matter of contract interpretation whether San Francisco violated its grant assurance. This contention misunderstands the nature of federal regulation of airport noise. It also misunderstands the role of the Airport and Airway Improvement Act, which denies federal funds to airport proprietors who exceed their regulatory authority by denying use of an airport on an unjustly discriminatory basis.

[2] The federal government regulates aircraft and airspace pervasively, preempting regulation of aircraft noise by state or local governments. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). However, Congress reserved a limited role for local airport proprietors in regulating noise levels at their airports. *See Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981) ("Congress intended that municipal proprietors enact reasonable regulations to establish acceptable noise levels for airfields and their environs."); *see also City of Burbank*, 411 U.S. at 635 n.14.; *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1316 (9th Cir. 1981).

[3] Congress made it clear, however, that the power delegated to airport proprietors to adopt noise control regulations is limited to regulations that are not unjustly discriminatory. When the Federal Aviation Act was amended in 1968 to extend the FAA's authority to regulate aircraft noise, the Sen-

ate Report accompanying the bill quoted with approval a letter from the Secretary of Transportation. The letter set forth the existing limited authority of airport proprietors to adopt nondiscriminatory noise regulations and stated that the 1968 amendment would not alter that limited authority:

> the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

S. Rep. No. 1353, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News 2688, 2694.

[4] Courts have recognized both the delegation of regulatory power to airport proprietors and the limitation of this power to the issuance of nondiscriminatory regulations. *See City of Burbank*, 411 U.S. at 635 n.14 (quoting the Secretary of Transportation's letter); *British Airways v. Port Auth. of New York* (*Concorde I*), 558 F.2d 75, 84 (2d Cir. 1977) (a local airport proprietor "is vested only with the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs"); *British Airways v. Port Auth. of New York*, 564 F.2d 1002, 1011 (2d Cir. 1977) (*Concorde II*) (maintaining "a fair and efficient system of air commerce . . . mandates that each airport operator be circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules defining the permissible level of noise which can be created by aircraft using the airport").

Although Congress has revisited the issue of how best to control airport noise on a number of occasions, it has declined

to alter the delegation to airport proprietors of the limited noise control authority described in the Secretary's 1968 letter. *See* S. Rep. No. 1160, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4655, 4663 (accompanying Noise Control Act of 1972) ("[t]his does not address responsibilities or powers of airport operators . . ."); S. Rep. No. 52, 96th Cong., 2d Sess. 13 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 89, 101 (accompanying Aviation Safety and Noise Abatement Act of 1979) ("[N]othing in the bill is intended to alter the respective legal responsibilities of the Federal Government and local airport proprietors for the control of aviation noise.").[2]

[5] The conditions Congress imposed on the grant to local airport proprietors of money from the Airport and Airway Trust Fund are designed in part to insure the maintenance of conditions essential to an efficient national air transport system, including access to airports on a reasonable and nondiscriminatory basis. Section 2210(a) of the Airport and Airway Improvement Act of 1982 requires the Secretary of Transportation to obtain certain assurances from airport proprietors as a condition of receiving a grant from the Fund. The first of these conditions is that the Secretary must

> receive assurances in writing, satisfactory to the Secretary that - (1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination . . . .

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[2]Neither the FAA or this Court has considered whether the Airport Noise and Capacity Act of 1990, 49 U.S.C. app. §§ 2151-58, alters this division of responsibility since the Act was passed after the administrative proceedings were completed. We also note, but do not consider, Congress' 1990 declaration that the Airport and Airway Improvement Act "should be administered in a manner consistent with" the goal of "preventing unjust and discriminatory practices, *including as they may be applied between category and class of aircraft*." 49 U.S.C.A. app. § 2201(a)(5) (1991) (emphasis added).

49 U.S.C. app. § 2210(a)(1).[3] Grants must be offered upon terms and conditions the Secretary considers necessary to meet the requirements of the statute, 49 U.S.C. § 2211(a), and the Secretary may not approve a grant application unless the Secretary is satisfied that this and other requirements of the statute have been met. 49 U.S.C. app. § 2208(b)(1)E.

Pursuant to this statutory scheme, San Francisco received grant offers requiring San Francisco to assure the Secretary, in language tracking the statute, that it would operate its Airport on a fair and reasonable basis and without unjust discrimination. A grant agreement based on such an offer is not an ordinary contract, but part of a procedure mandated by Congress to assure federal funds are disbursed in accordance with Congress' will. Whether San Francisco violated this assurance depends upon whether its regulation conflicted with the statutory condition imposed by section 2210(a)(1) and incorporated in the grant contract.[4]

[6] While we review questions of statutory interpretation de novo, we accord substantial deference to the interpretation adopted by the agency charged with administering the statute. *Utility Reform Project v. Bonneville Power Admin.*, 869 F. 2d 437, 442 (9th Cir. 1989). The FAA's interpretation of what constitutes unjust discrimination within the meaning of section 2210(a)(1) will be upheld unless it is unreasonable. *See id.* Deference is especially appropriate because Congress

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[3]The conditioning of federal grants to airport proprietors on assurances the airport will be available "for public use on fair and reasonable terms and without unjust discrimination" has a long history. The language in the present Act is taken directly from its predecessor, the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, Title I, § 18, 84 Stat. 229 (1970), which continued the language from its predecessor, the Federal Airport Act, Pub. L. No. 79-377, § 11, 60 Stat. 176 (1946).

[4]Because the relevant language in the 1982 airport improvement act and its 1970 predecessor is identical, *see supra* note 3, it is irrelevant whether the particular grant assurances at issue were made pursuant to one act or the other.

expressly mandated FAA enforcement of the statute by the Secretary (who delegated that duty to the Administrator) and, as the administrative record in this case demonstrates, application of the statute to airport noise regulations requires technical expertise.

III

A

The Administrative Law Judge found San Francisco had excluded the Q707 under the noise regulation because San Francisco had concluded the Q707 was noisier in takeoff than any other aircraft using the Airport. The ALJ found San Francisco's determination had been mistaken, and that other aircraft permitted to use the Airport under the regulation were as noisy or noisier than the Q707. The FAA Administrator stated:

> [San Francisco] has apparently abandoned its contention that the aircraft's takeoff noise exceeded that of all other aircraft at [the Airport]. Indeed, [San Francisco] concedes the correctness of the Initial Decision's factual findings that during the period the Q707 has been denied permission to operate at the Airport, 15 other models of aircraft, emitting as much or more noise than the Q707, have been permitted to operate there; and that operators of these airlines have been permitted to increase the number of flights with these aircraft types. [San Francisco] also does not dispute that at least 560 takeoffs and landings are performed each month at [the Airport] by six aircraft models noisier than the Q707.

The factual assumption on which San Francisco denied a waiver to the Q707 was similarly mistaken. San Francisco based the denial on its conclusion the Q707 met Stage 2 standards through the use of thrust cutbacks and decibel tradeoffs,

and would therefore be noisier in takeoff than all other aircraft at the Airport. The ALJ found, on substantial evidence, many aircraft models operating at the Airport, including aircraft models conducting more than half the departures from the Airport in 1985, also met Stage 2 requirements through the use of cutbacks and tradeoffs, and, as mentioned earlier, some of these planes were as noisy or noisier in takeoff than the Q707.

[7] The Administrator approved the ALJ's holding that because San Francisco's noise regulation allowed planes that were equally noisy or noisier than Q707s to operate at the Airport and increase in number without limit, while excluding the Q707 based on a characteristic that had no bearing on noise (date of type-certification as meeting Stage 2 requirements), the regulation violated the requirement of section 2210(a)(1) and of San Francisco's grant assurance that the Airport would be available "without unjust discrimination." The Administrator noted

> [e]xclusion of the Q707 based on the date of modification, rather than the date of complying operation is neither rational nor reasonable. The date of retrofit is irrelevant to the amount of noise an aircraft emits.

[8] We are satisfied that the Administrator's interpretation of section 2210(a)(1), and therefore of the grant assurance, was reasonable. The Administrator held the

> issue to be resolved was whether [San Francisco's] actions were discriminatory, as demonstrated by the evidentiary record and application of appropriate decisional law. In this respect, the ALJ's reliance on the *Concorde Cases* was proper.

We agree with the Administrator. The central issue was whether San Francisco's regulation was unjustly discriminatory within the meaning of the statute, and the Second Cir-

cuit's *Concorde Cases* were sound authority for the conclusion that it was.[5]

Concorde I recognized that the interest in a safe and efficient national air transport system reflected in the federal legislative scheme required that local airport proprietors exercise their power to control airport noise in a reasonable and nondiscriminatory fashion and in conformity with federal law, including specifically the requirement that airports be "available for public use on fair and reasonable terms and without unjust discrimination." 558 F.2d at 85. *Concorde II* applied this principle to enjoin an airport proprietor from further delaying access to its airport by a supersonic plane when the record established the supersonic plane satisfied the decibel-based noise standard applied by the airport proprietor to subsonic aircraft that were permitted to use the airport. The court stated the decision was based in part upon the court's obligation to enforce "the proprietor's observance of the strict statutory obligation to make his facility available for public use on fair and reasonable terms, and without unjust discrimination . . . ." 564 F.2d at 1011.

In *Concorde II*, as in the present case, the action of an airport proprietor purporting to exercise delegated authority to regulate noise was held to constitute "unjust discrimination"

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[5]The FAA Administrator rejected San Francisco's contention that the equal protection clause provides the measure of legality of San Francisco's noise regulation. San Francisco argued *New Orleans v. Dukes*, 427 U.S. 297 (1976), provided the appropriate test. As the Administrator noted, however, *New Orleans v. Dukes* applies only when the Equal Protection Clause alone is invoked and not, as in this case, "when local regulation is challenged under the Supremacy Clause as inconsistent with relevant federal laws. . . ." 427 U.S. at 304 n.5.

San Francisco's argument its exclusion of the Q707 was valid because it had a reasonable belief the Q707 was noisier than all other planes is based on its mistaken reliance on equal protection law and was properly rejected by the FAA. In any event, the ALJ found San Francisco did not have such a reasonable belief.

within the meaning of the statute when the action resulted in denial of use of the airport to planes that met noise standards applied to other aircraft allowed use of the airport. *Concorde II*, 564 F.2d at 1012.[6]

[9] In the present case, as in the *Concorde Cases*, use of noise control regulations by an airport proprietor to bar aircraft on a basis other than noise, or without a factual basis, was found to be inconsistent with a fair and efficient national air transport system. This test of "unjust discrimination" is a permissible construction of the language of section 2210(a)(1) and the policies it serves.

San Francisco argues its noise regulation is valid because San Francisco had a rational basis for believing the regulation would reduce Airport noise levels by eliminating the Q707, admittedly a noisy aircraft, and encouraging a shift to quieter Stage 3 aircraft. The argument rests in part upon the contention that equal protection law provided the appropriate test for

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[6]Similarly, in *Santa Monica Airport Ass'n. v. City of Santa Monica*, we struck down a ban on the operation of jet aircraft on the basis of noise under the commerce and equal protection clauses because the quality and quantity of noise emitted by the jets had no greater tendency to irritate and annoy than that emitted by permitted prop planes. *Santa Monica*, 659 F.2d 100, 105 (9th Cir. 1981), *affirming* 481 F. Supp. 927, 943-44 (C.D. Cal. 1979). Although the statutory prohibition against "unjust discrimination" was not applicable, the district court indicated it would have rejected an argument that "grant agreement rights and the Federal Aviation Act obligations are any broader or different than the constitutional issues." 481 F. Supp. at 946.

San Francisco's reliance on *Global Int'l Airways v. Port Auth. of New York* 727 F.2d 246 (2d Cir. 1984) (*Global I*), as support for its regulation is misplaced. *Global I* held airport proprietor noise regulations could be aimed at reducing cumulative noise levels rather than barring aircraft that exceeded a maximum decibel level, but also noted aircraft could only be denied use of an airport "on the basis of non-discriminatory noise criteria." *Global I*, 727 F.2d at 248. The court did not decide whether the noise regulation before it was unjustly discriminatory. *See Global Int'l Airways v. Port Auth. of New York*, 731 F.2d 127, 130 n.1 (2d Cir. 1984) (*Global II*).

evaluating the regulation, a contention the Administrator properly rejected. *See supra* note 5. Moreover, it was not unreasonable for the FAA to interpret the statute as requiring more than that San Francisco's regulation reduce noise, since the statute required the Airport be available "without unjust discrimination," a requirement obviously important to an efficient national air transport system dependent upon flights by particular aircraft to various airports along a national route. Exclusion of jet-propelled or supersonic aircraft would have reduced noise, yet the discriminatory exclusion of these planes was held to be beyond the power of local airport proprietors. *See Santa Monica*, 659 F.2d at 105; *Concorde II*, 564 F.2d at 1012.

San Francisco also argues it reasonably denied the Q707 a waiver because allowing Burlington's Q707s to operate would increase the cumulative noise level at the Airport by "opening the floodgates" to operations by Q707s owned by others as well as to other Stage 1 aircraft retrofitted after the cut-off date. Again, the FAA was not required to approve a discriminatory regulatory scheme simply because it may have had the effect of reducing noise. It was only because of the 1978 Regulation that the Q707 had to apply for a waiver in the first place; that San Francisco might find non-discriminatory grounds for barring the Q707 once the waiver stage was reached does not validate the discriminatory regulatory scheme itself.

San Francisco argues its 1978 regulation is a lawful exercise in "grandfathering" under *New Orleans v. Dukes*, 427 U.S. 297 (1976), which rejected an equal protection challenge to a local regulation that banned pushcart vendors but exempted vendors who had operated eight years or more. *See also Western Air Lines v. Port Auth. of New York*, 817 F.2d 222, 226 (2d Cir. 1987) *affirming* 658 F. Supp. 952, 959-60 (S.D.N.Y. 1986) (upholding an exercise of "grandfathering" in airport regulation). The FAA questioned the applicability of *Dukes* to this case, which does not involve an equal protec-

tion challenge and does involve an explicit statutory prohibition against unjust discrimination. In any event, San Francisco's 1978 Regulation does not grandfather planes, but types of planes. The number of takeoffs and landings by aircraft as noisy or noisier than the Q707 at San Francisco Airport could actually increase rather than decrease as a result of the regulation, refuting the contention it was simply an exercise in "grandfathering."

San Francisco argues it cannot ban the noisiest types of aircraft from its Airport because five of the six models noisier than the Q707 are Boeing 747s, crucial for long-distance international travel, and it would be impractical and an undue burden on interstate commerce to ban them. Even if true, this would not justify exclusion of the Q707 on the basis of a factor — date of type-certification as meeting Stage 2 standards — unrelated to noise.

B

San Francisco asserted a defense of impossibility to the allegation it had breached its grant assurances, claiming its noise regulation was necessary to comply with California law. California requires airport proprietors to meet certain noise standards or obtain a variance to continue operating. *See* Cal. Pub. Util. Code §§ 21661-669.6; 21 Cal. Code of Regulations §§ 5000-90. *See also Air Transport Ass'n of America v. Crotti*, 389 F. Supp. 58, 61-62 (N.D. Cal. 1975) (describing California's regulatory scheme). In 1982 San Francisco obtained a variance from the California Department of Transportation requiring that San Francisco "not knowingly permit or authorize any activity in conjunction with the Airport which results in an increase of the size of the noise impact area. . . ." The version of the variance still in force commits San Francisco to "continue reducing the number of dwelling units located within the 65 [decibel] or greater" range of the Airport. San Francisco argues that admitting the Q707 would violate the terms of this variance.

[10] We reject San Francisco's suggestion that a state contract defense could authorize San Francisco to adopt a noise regulation prohibited by federal law. Assuming the contrary, however, there is no merit in the defense. As the FAA pointed out, San Francisco failed to show that admitting the Q707 would violate the variance. Moreover, we note that the 1978 Regulation was not the only method San Francisco might choose to comply with the variance; the Q707 could be barred from operating at the Airport if the regulation barring it was not unreasonably discriminatory.[7]

C

In 1988, San Francisco adopted a new noise regulation requiring, effective in 1989, all carriers conduct at least 25% of their operations at the Airport with Stage 3 aircraft. Since Burlington has announced it will continue to use only Stage 2 aircraft, San Francisco argues the new regulation will prevent Burlington from operating at the Airport independently of the 1978 Regulation, and therefore, mooted any previous violation of San Francisco's assurance based on the 1978 Regulation.

Even if Burlington were to buy enough Stage 3 planes to comply with the 25% requirement, however, its remaining Q707s still would be excluded, while other operators combining "grandfathered" Stage 2 retrofits with Stage 3 aircraft

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[7]Because San Francisco was not required by California law to adopt its 1978 Regulation, the FAA correctly held California was not a necessary party to the administrative proceeding. California, as amicus curie, agrees California law did not subject San Francisco to inconsistent obligations and that California was not a necessary party. However, California urges us to reject language in the FAA Administrator's ruling that California's efforts at airport noise control through variances are preempted by federal law, arguing the Administrator's broad language about federal preemption stems from a misreading of our decision in *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981). Resolution of the issue is not necessary to our decision, and we decline to address it.

would not be. Thus, San Francisco's regulatory scheme continues to discriminate against the Q707.

[11] San Francisco argues Burlington failed to exhaust its administrative remedies by not seeking a waiver of the 1988 resolution. The FAA correctly concluded such an application would be futile: the same discrimination against the Q707 exists under the 1988 regulation as under the 1978 Regulation, for which a waiver was denied.

IV

[12] In 1987, Congress amended the Airport and Airway Improvement Act to impose a 180-day limit on the time the FAA may take to consider airport improvement grant applications. The amendment, codified at 49 U.S.C. app. § 2218(b)(1), provides:

> The Secretary may not withhold approval of a grant application ... for a violation of an assurance or other requirement of this chapter unless —
>
> (A) the Secretary provides the applicant with an opportunity for a hearing; and
>
> (B) within 180 days after the date of such application or the date the Secretary first knows of such noncompliance, whichever is later, the Secretary makes a determination that the violation has occurred.

The parties agree the FAA did not deny or approve San Francisco's grant applications for fiscal years 1986 through 1989 within the mandated period. San Francisco argues the FAA is required by section 2218(b) to set aside the airport improvement funds at issue even if we uphold the FAA's decision that the noise regulation violates the statute and San Francisco's assurance. We agree in part.

[13] The statutory language is mandatory, leaving the FAA no discretion. It compels timely approval or denial of grant applications. The House bill originally set the limit at 90 days. The Senate-House conference extended the deadline to 180 days with the stated expectation that the FAA "will adopt procedural schedules which will permit cases to be completed in 180 days, without depriving parties to the cases of procedural due process." H.R. Conf. Rep. No. 484, 100th Cong., 1st Sess. 69, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2533, 2644. The purpose of the amendment can be inferred from the deadlines placed on appropriations of entitlement funds. If such funds are not obligated to an airport by the end of the second fiscal year following the final year to which the entitlement applies, the entitlement will lapse. *See* 49 U.S.C. app. § 2207(a). Delay in approving the grant application, or in administrative review of a denial, would put the funds in danger of lapsing without a final judgment that could be judicially reviewed. *See City and County of San Francisco v. Engen*, 819 F.2d 873, 875 (9th Cir. 1987). Congress apparently sought to avoid this danger by mandating a prompt decision by the FAA.

[14] The FAA argues the statute does not apply retroactively and so does not compel approval of grants for the years 1986 and 1987. San Francisco agrees, but notes it refiled the grant applications for these years after the statute was amended. The FAA points to no bar to refiling applications for previous years. We hold the refiled applications are subject to the 180-day limitation period in the same way as newly filed ones.

The FAA argues grant approval would be meaningless. Section 2218(b) allows the Administrator to continue to withhold already-obligated payments for another 180 days without a hearing or decision. The FAA argues it had a total of 360 days to decide whether or not to withhold payment, and met that deadline. It would be a "useless gesture," the FAA con-

cludes, to order grant approval when the Administrator may refuse to pay.

We disagree with the FAA's reading of the statute. If Congress had wanted to establish a single 360-day period for grant approval and fund disbursement, it could easily have said so. This case does not require us to decide whether the FAA may decline to disburse the funds generated by the current grant applications, and we leave that question to another day.

Finally, the FAA argues San Francisco should be estopped from invoking the 180-day time limit because San Francisco's own refusal to abide by a tighter discovery schedule caused the delay. San Francisco presented evidence it proposed the discovery schedule in reliance on the FAA's representation the proceeding was not the required statutory "hearing" under section 2218(b). The FAA does not suggest the discovery proposal was improperly motivated. In any case, even under the FAA's proposed schedule, completion of the hearing and administrative appeal process within the required period would have been difficult if not impossible.

Although the FAA admits it failed to approve or deny San Francisco's fiscal year 1986 and 1987 applications within the statutory period, it argues its December 12, 1988 decision finding San Francisco in violation of grant assurances for the 1986 and 1987 fiscal years, and rejecting San Francisco's applications for these years and while the discriminatory regulation remained effective, disposed of the need to consider future grant applications until San Francisco cured the default. We agree. It would be a useless paper-shuffling for the FAA to respond each year to a grant request premised on identical circumstances as the grant request rejected the previous year. San Francisco was entitled to have its applications approved under the statute only for the 1986 and 1987 fiscal years.

V

The County of San Mateo (San Mateo) appeals the ALJ's decision to deny it full intervenor status. San Mateo was not allowed to offer testimony, file motions, or participate in arguments and settlement negotiations, although it did file briefs and observe the proceedings. Intervention in FAA proceedings is permissive under FAA regulations if the intervenor "has a property or financial interest that may not be adequately represented" and "intervention will not unduly broaden the issues or delay the proceedings." 14 C.F.R. § 13.51 (1991). San Mateo's interest in this case stems from San Francisco International Airport's location in San Mateo County, and the effects of Airport noise on at least 20,000 County residents. The ALJ concluded San Francisco could adequately represent San Mateo's interest in enforcing the regulation.

San Mateo argues San Francisco could not adequately represent its interests because San Mateo and San Francisco Airport had been adversaries in previous state noise variance permit proceedings. However, the relevant consideration is whether the interests of the parties diverged in this proceeding, not in any other. *See United States v. American Telephone and Telegraph Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (adequacy of representation must be assessed in relation to the specific purpose of intervention). San Francisco had the same incentive as San Mateo to support the 1978 noise regulation. It was not an abuse of discretion to deny San Mateo County more than limited intervention.

VI

[15] We affirm the FAA's determination that the 1978 Regulation violated San Francisco's grant assurance. We also affirm the FAA's decision that California was not a necessary party to the administrative proceeding, and the FAA's decision to deny San Mateo County full intervenor status. How-

ever, we direct the FAA to approve San Francisco's applications for fiscal years 1986 and 1987 because the FAA failed to comply with 49 U.S.C. app. § 2218(b).

AFFIRMED in part, REVERSED in part. Each party to bear its own costs on appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89-70055

CITY AND COUNTY OF SAN FRANCISCO; THE AIRPORTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents.

No. 89-70053

COUNTY OF SAN MATEO,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents.

No. 89-70057

CITY AND COUNTY OF SAN FRANCISCO; THE AIRPORTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents,

BURLINGTON AIR EXPRESS ("BURLINGTON"),

Respondent-Intervenor.

No. 89-70482

CITY AND COUNTY OF SAN FRANCISCO; THE AIRPORTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents.

No. 89-70483

CITY AND COUNTY OF SAN FRANCISCO; THE AIRPORTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents

No. 89-70500

COUNTY OF SAN MATEO,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION; DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents.

ORDER

Before: BROWNING, PREGERSON and TROTT, Circuit Judges.

San Francisco's petition for rehearing and suggestion for rehearing en banc is untimely, *See* Fed.R.App.P. 35(c), 40(a), and an extension of time is denied. San Francisco's petition will not be filed.

APPENDIX C

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

FAA Docket No. 13-86-2

In Re
San Francisco Airports Commission

ADMINISTRATOR'S DECISION AND FINAL ORDER OF NONCOMPLIANCE AND DEFAULT

SYNOPSIS:

The Administrator has determined that actions of the San Francisco Airports Commission excluding a Burlington Air Express Stage 2 compliant Q707 aircraft from San Francisco International Airport violate Assurance No. 20 of grant agreements between the Commission and the Federal Aviation Administration under the Airport and Airway Development Act of 1970, which require the Commission to operate the airport for the use and benefit of the public on fair and reasonable terms and without unjust discrimination. Accordingly, the Federal Aviation Administration's temporary suspension of funding approvals for San Francisco International Airport projects is affirmed and made final. In addition, no further applications for grant funds involving the San Francisco International Airport shall be approved until the Commission complies with its grant obligations.

I. BACKGROUND

The San Francisco Airports Commission ("Commission"), operator of the San Francisco International Airport ("SFIA"), for the proprietor, the City and County of San

Francisco, is charged with actions constituting unjust discrimination and, thus, noncompliance with and default of certain contractual obligations (assurances) contained in various grant agreements entered into with the Federal Aviation Administration (FAA) for receipt of Federal funds. The charge is based on the Commission's refusal, pursuant to its noise abatement regulations, to permit Burlington Air Express, a cargo airline, to operate FAR (Federal Aviation Regulation) Part 36 (14 C.F.R. Part 36) Stage 2 compliant retrofitted Boeing Q707 aircraft at SFIA, beginning in 1985, while, at the same time, allowing as noisy or noisier Stage 2 aircraft to operate.

In November 1984, Burlington purchased eight used B707-300, Stage 1 aircraft, which were to be operated by Southern Air Transport ("SAT") under lease. Over the next year, the aircraft were retrofitted with hush kits to satisfy the Stage 2 noise standards of Part 36 and were redesignated as Q707s. On March 6, 1985, the FAA issued a supplemental type certificate for the first of the retrofitted aircraft, finding it in compliance with the Part 36 Stage 2 noise standards. By April 16, 1985, seven of the planes had been certificated as Stage 2 noise compliant.

On September 20, 1985, Southern Air Transport sought permission to operate the Q707 at SFIA, beginning November 1, 1985, by filing an application for a waiver[1] of Commission Resolution 78-0131, a 1978 noise abatement regulation which provided, in part:

> In order to continue operating at San Francisco International Airport all commercial jetpowered transport type aircraft, which are of an aircraft type now operating at San Francisco Interna-

[1] Pursuant to this Resolution, the Commission permitted aircraft types not previously operated at SFIA (*e.g.*, the Q707) to commence operations only if the aircraft type had been certified by the FAA as meeting Part 36 requirements prior to January 1, 1985. The Resolution also authorized a "waiver" of this date requirement by the Commission.

> tional Airport must: (1) be certified under the Federal Aviation Regulations-Part 36 Noise Standards; or (2) be replaced prior to January 1, 1985, with an aircraft that is certified under Federal Aviation Regulations-Part 36; or (3) receive currently approved retrofit modifications so as to be in compliance with FAR 36 as implemented by Subpart E, FAR Part 91. Retrofit modifications must be accomplished no later than January 1, 1985.
>
> In order to operate at San Francisco International Airport all commercial jetpowered transport type aircraft, subsonic or supersonic, which are of a type not presently operating at San Francisco International Airport must be certified under Federal Aviation Regulations-Part 36 Noise Standards prior to commencing operation.

On October 17, 1985, Louis A. Turpen, Director of Airports, denied the request for a waiver of Resolution 78-0131. The reasons stated for denial were that the Q707's compliance with Part 36 Stage 2 standards relied on the "decibel tradeoff" and "thrust cutback" procedures of Part 36[2]; that the Q707's noise at takeoff was 2dB higher than the maximum authorized for Stage 2 compliance, which would make that aircraft noisier at takeoff than any other aircraft at SFIA;[3] and that the Airport was required to reduce its noise impact area under the terms of its variance from a California noise law. FAA Counsel Notice, Exh. 8.

Following the Commission's denial of waiver, negotiations about operating the Q707 at SFIA ensued among

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[2] These procedures, specifically permitted by Part 36 to achieve Stage 2 standards, are set out at 14 C.F.R. § 36.7(c) and § 36.5(b), and are described in the Initial Decision ("I.D.") at 4-5, n. 3.

[3] *See*, n. 4, *infra*.

the Commission, FAA officials, Burlington, and SAT, but these efforts were not successful. During this time, the Commission also adopted, on December 17, 1985, Airport Operations Bulletin 85-07-AOB, which stated that waivers would not be granted for any aircraft type that relied on "cutback" or "tradeoff" to meet Stage 2 noise standards on take off. FAA Counsel Notice, Exh. 12. In addition, a series of letters to the Commission from various FAA officials affirmed the validity of the cutback and tradeoff provisions and cautioned the Commission that its exclusion of the Burlington Q707 appeared arbitrary and unjustly discriminatory under applicable Federal statutes and grant agreements. *See, e.g.*, FAA Counsel Notice, Exh. 11.

On January 9, 1986, the Airport Director informed an FAA official that further consideration of Burlington's request would require resubmission of the waiver application, this time as a request for a variance, in order to "exhaust administrative remedies." FAA Counsel Notice, Exh. 13. Burlington sought the variance, and the Commission received information regarding the application on March 18, 1986. The Commission issued Resolution 86-0073 on April 15, 1986, denying Burlington a variance and affirming its earlier decision not to permit Q707 aircraft to operate at SFIA.[4] FAA Counsel Notice, Exh. 16. On May 1, 1986, Burlington requested reconsideration of the Commission's Resolution (FAA Counsel Notice, Exh. 17); on May 12, the Airport Director denied reconsideration. FAA Counsel Notice, Exh. 18.

Following the Commission's initial refusal in October 1985, and after negotiations proved unsuccessful, Burlington filed a complaint with the Federal Aviation Adminis-

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[4] One of the Resolution's findings was that without cutback, the Q707 was "significantly louder in takeoff mode than any other aircraft permitted to operate at SFIA since January 1, 1985." Exh. 16. Evidence at hearing demonstrated that this finding was incorrect. Initial Decision at 7-9. The Commission subsequently abandoned this contention.

tration on April 2, 1986, pursuant to 14 C.F.R. § 13.5 (FAA Counsel Notice, Exh. 1). The Commission responded on June 24, 1986, denying that its actions were arbitrary or discriminatory.

On July 7, 1986, the Federal Aviation Administration's Office of Chief Counsel ("FAA Counsel") commenced an enforcement proceeding against the Commission by filing a "Notice of Proposed Cease and Desist Order" ("FAA Notice") charging that unjustly discriminatory, unreasonable, arbitrary, and in violation of statute (49 U.S.C. 1701 *et seq.*; 49 U.S.C. 2201 *et seq.*; and 49 U.S.C. 1349(a)) and of various assurances in grant agreements for Federal funding for SFIA the Commission had entered into with the FAA. On the same day, FAA Counsel temporarily suspended approval of Commission applications for Federal airport funds, pending the outcome of this proceeding.

On January 22, 1988, the Commission repealed its 1978 Resolution (78-0131), replacing it with a new resolution (Resolution 88-0016), which serves as the basis for the Commission's continuing exclusion of the Q707. Section 4(a) of Resolution 88-0016 states:

> . . . [a]n aircraft will be permitted to commence or continue operation at SFIA only if it is a Stage 3 aircraft or a Stage 2 aircraft of a type of Stage 2 aircraft operating at SFIA on or before January 1, 1985.

II. APPEAL OF PREHEARING RULINGS

This proceeding, initiated by the July 7, 1986 Notice of Proposed Cease and Desist Order, was assigned to United States Department of Transportation Chief Administrative Law Judge (ALJ) William A. Kane, Jr., on August 27, 1987. The proceeding has been lengthy, due, at least in part, to a number of motions and related rulings, both procedural and substantive, filed prior to the commencement of hearing on May 2, 1988. Following issuance of

the ALJ's Initial Decision on August 9, 1988, the Commission, FAA Counsel, Burlington, SAT, and San Mateo County appealed, pursuant to 14 C.F.R. § 13.20, the Initial Decision and various rulings rendered by the ALJ during the course of the proceeding. Parties filed briefs on September 19, 1988, and reply briefs on October 11. Appeals concerning the various prehearing rulings will be considered first.

A. Dismissal of Charges

The July 1986 Notice contained five charges. FAA Counsel charged that the Commission's actions in excluding Burlington were: (1) a violation of § 18 of the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 *et seq.* ("1970 Act") and (2) a violation of § 511 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2201 *et seq.* ("1982 Act"), both of which require written assurances from grantees that the airport to which a federally funded project relates ". . . [w]ill be available for public use on fair and reasonable terms and without unjust discrimination. . . ."; (3) a violation of assurances contained in the grant agreements between the Commission and the FAA executed under the 1970 Act; (4) a violation of identical assurances contained in grant agreements executed under the 1982 act, in all of which the Commission promised that SFIA "will be available for public use on fair and reasonable terms and without unjust discrimination"; and (5) a violation of § 308(a) of the Federal Aviation Act, 49 U.S.C. § 1439(a), which prohibits an airport from providing an "exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended."

On March 13, 1987, the Commission failed a motion to dismiss or to strike the July 1986 Notice.[5] On August 13,

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[5] FAA Counsel and Burlington each filed an answer opposing the motion on April 10, 1987; the Commission filed a reply on April 20,

1987, the ALJ issued an order[6] granting, in part, the Commission's motion and ordering the case to proceed to hearing on only one of the charges: the alleged violation of Assurance No. 20 of grant agreements entered into between the Commission and the FAA under the 1970 Act.[7] FAA Counsel and Burlington appeal the ALJ's dismissal of three of the charges.

1. 1982 Act Statutory and Grant Assurance Charges

FAA Counsel and Burlington contend that the ALJ's dismissal of the Notice's statutory and grant assurance charges based on the Airport and Airway Improvement Act of 1982, on the grounds of lack of subject matter jurisdiction, was in error. The ALJ ruled that he lacked jurisdiction to consider charges based on the 1982 Act because the procedural regulations governing this case, 14 C.F.R. Part 13, had not been updated to list the 1982 Act among the statutes covered by these procedural regulations.[8]

The procedural regulations of 14 C.F.R. Part 13, "Investigative and Enforcement Procedures," contain the rules of practice for FAA hearings (Subpart D). These are not substantive regulations. Part 13 contains no guidelines re-

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1987; and FAA Counsel and Burlington filed sur-replies on April 30, 1987.

[6] Petitions for reconsideration of the August 13 order were filed, and the ALJ vacated portions of that order and issued an amended order on November 3, 1987. That order reiterated the dismissal of all but one of the Notice charges.

[7] The ALJ also made substantive rulings on several matters in his August 13, 1987 order. Certain of those rulings are also appealed, and are treated separately in this Decision and Final Order.

[8] Because the procedural regulations list the Airport and Airway Development Act of 1970, the Administrative Law Judge did not dismiss the charge of grant assurance violation related to grants under that Act; however, the ALJ dismissed the 1970 Act's statutory charge, finding that the 1970 Act had been repealed by enactment of the 1982 Act. No party has appealed dismissal of that charge.

garding the manner in which charges of statutory or contractual violations related to the Airway and Airport Improvement Act of 1982, or any other statute, are to be interpreted. Substantive standards of the 1982 Act are set forth in that Statute; Congress created the standards and assigned the FAA the duty of implementing and enforcing them. The Part 13 regulations are procedural only; as such, they are not, and cannot be, jurisdiction for a proceeding. Even if no Part 13 regulations existed, the FAA could enforce its grant agreements as long as due process was afforded the grant recipients.

It is unclear why the ALJ misapprehended the procedural nature of the Part 13 regulations, or why he failed to distinguish procedural from substantive regulations. Regardless of his reasons, however, I find that the ALJ's dismissal of the charges related to the 1982 Act was clear error.

FAA Counsel urges that I issue a ruling on the 1982 Act charges, pursuant to the authority of §§ 509 and 511 of the 1982 Act. In support of this argument, FAA Counsel points out that the 1982 Act did not substantively change the applicable nondiscrimination requirements of the 1970 Act, and that the grant assurances the Commission agreed to as a condition for receipt of Federal funds under both Acts are identical. Given the identity of the statutory provisions and grant assurances, it is likely that the record established in this proceeding and affirmance of the ALJ's substantive finding of discrimination under the 1970 Act grant assurances, discussed *infra*, would be sufficient to support a determination that the Commission violated grant assurances it entered under the 1982 Act. The Commission, however, contends that this case must be remanded to the ALJ for further proceedings, should it be determined that dismissal of the charges related to the 1982 Act was improper.

However, I find I need not formally decide this issue. In view of the affirmance of the ALJ's substantive findings

and imposition of the remedy sought by FAA Counsel, *infra*, additional determinations based on the 1982 Act and associated grant agreements would not affect the outcome of this proceeding.

2. Exclusive Right Charge

FAA Counsel and Burlington also appeal the ALJ's August 13, 1987 dismissal of the charge that the Commission's actions violated § 308(a) of the Federal Aviation Act, 49 U.S.C. § 1349(a), which prohibits the grant of an "exclusive right" for the use of any federally funded landing area or air navigation facility.

The ALJ dismissed this charge on the grounds that an exclusive right cannot be granted to an "indefinite universe of persons;" that FAA Counsel had cited no precedent in support of its interpretation of § 308(a); and that the FAA had not made public its interpretation of this statutory provision.

On appeal, FAA Counsel and Burlington contend that the ALJ erred because an exclusive right had been conferred on those carriers the Commission had allowed to operate at SFIA while excluding Burlington's Q707. FAA Counsel further contends that the ALJ failed to afford proper deference to its interpretation of § 308(a), noting that the FAA's policy interpretation of that provision was published in the Federal Register in 1965.

Review of the ALJ's August 13, 1987 Order (at 11-12) shows that the ALJ was particularly concerned with the failure of FAA Counsel to identify the party or parties to whom an exclusive right had been granted, finding no support in case law for the proposition that an exclusive right is granted to an entire class of persons who are not otherwise excluded. The ALJ found that the claim that "everyone in an indefinite universe of persons . . . could be granted an exclusive right. . . because one party was denied that right" was not an interpretation of § 308(a)

supported by the language of the statute or relevant precedent.

On appeal, FAA Counsel still has failed to identify any such precedent. Moreover, while there is no doubt that Burlington has been "excluded," this does not mean that an "exclusive right" has been afforded the numerous other carriers serving SFIA. Thus, I find that ALJ's dismissal of the § 308 charge in this proceeding was not error.

This ruling should not be understood as meaning, or even implying, that an "exclusive right" can be conferred only on a single beneficiary. The case law is to the contrary. *See, e.g., Midway Airlines v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y., 1984). Indeed, not even the Commission advocates such a narrow definition. However, application of § 308(a) to the circumstances of this case would be an overly broad reading of that statute.

B. Additional Charges/Amendment of Notice

FAA Counsel asserts that the ALJ also erred in refusing to permit amendment of its Notice to include charges that the Commission had excluded eight other operators who had sought permission to operate retrofitted Stage 2 Q707 and DC-8 aircraft at SFIA.[9] Order of the ALJ, February 16, 1988.

FAA Counsel contends that, contrary to the ALJ's finding, inclusion of these additional charges would not have unduly burdened or delayed this proceeding. FAA Counsel also points out that under Part 13 (14 C.F.R. § 13.45), a complaint can be amended up to 10 days before hearing,

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[9] Except for Burlington, no carrier has filed a formal complaint asserting exclusion from SFIA. If the Commission attempts to exclude other carriers operating Q707 or DC-8 aircraft, FAA Counsel can commence appropriate action at that time. In view of the principles established by this decision, such a future proceeding should be handled expeditiously.

and the request to amend was filed more than 90 days before hearing in this case.

In general, ALJ rulings of this sort are entitled to deference and should be reversed only if there is a showing of a clear abuse of discretion. Thus, while the ALJ could have permitted amendment, FAA Counsel has not shown an abuse of discretion sufficient to reverse the ALJ's determination. Indeed, in view of the inordinate amount of time this proceeding has consumed, the possibility that inclusion of additional charges would have further burdened or delayed this proceeding supports the ALJ's denial.

C. State of California

The Commission alleges error in the ALJ's refusal to determine whether exclusion of the Q707 was required by California airport noise variances. Order of November 3, 1987; Initial Decision at 6, n. 4. The Commission submits that its required compliance with the California noise variance law "compelled" the Airport to exclude the Q707, and the ALJ's refusal to rule on this issue combined with subsequent affirmance of the Initial Decision will result in the Commission facing inconsistent obligations of State and Federal law.[10]

This argument must be rejected. Efforts by the State of California to enforce noise conditions on variances issued to airport proprietors are preempted as a matter of Federal law. *San Diego Unified Port District v. Gianturco,*

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[10] There has been no showing that admitting the Q707 would be inconsistent with the variance. Over time, is it likely that the noise contour at SFIA will continue to shrink, regardless of whether the Q707 operates, as additional Stage 3 aircraft are introduced by the airlines. While each flight adds a discrete amount of noise, the operation of some number of Q707 flights cannot, by itself, violate the variance, since its effect is not qualitatively different from adding flights with any aircraft—whether relatively noisy B-727s or quieter, Stage 3 aircraft.

651 F.2d 1306 (9th Cir. 1981), *cert. den.*, 455 U.S. 1000 (1982), citing *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

Similarly, the Commission asserts that the ALJ improperly refused to join the State of California as a party to this proceeding, based on the noise variance law. The ALJ denied the Commission's motion on the ground that the State was not a party to the grant agreements at issue. As *Gianturco, supra*, makes clear, the ALJ' s determination that the effect of the California noise variance law was irrelevant to this proceeding was correct.

Finally, the Commission argues that because the California noise variance law compelled its exclusion of the Q707, the Commission has a "complete defense" to any claim that it breached the grant agreements.[11] In other words, adherence to California law made the Commission's performance under the grant assurances impossible, and non-performance resulting from impossibility discharges all contractual duties. Of course, this argument must be rejected. As the State is preempted from taking action against the Airport, there is no "impossibility" and no discharge.

D. San Mateo County

San Mateo County, California, appeals the ALJ's ruling of March 17, 1987, refusing to grant the County full party status as an intervenor.

Intervention in a part 13 proceeding is limited to persons who demonstrate that they may be bound by the order to be issued, or who demonstrate a property of financial interest not adequately represented by existing

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[11] In this regard, the Commission understands that violation of the grant assurances by the Commission in excluding the Q707 is a breach of the grant, or contract, between the Commission and the FAA. As the Commission obviously recognizes, the breaching party bears the liability.

parties. Intervention is not a matter of right. 14 C.F.R. § 13.15.

San Mateo sought intervention on the grounds that San Francisco International Airport is located within that County; County residents are affected by SFIA noise; and it had a financial interest, based on tax revenues received from the Airport. The County, however, did not contend that these tax revenues would be adversely affected by any order that might issue, nor did the County show that its interests would not be adequately represented by the Commission.

The ALJ found that the County would not be bound by any proceeding order. He further found that the County alleged no interest that could not be adequately represented by the Airport Commission. In these circumstances, San Mateo was permitted to intervene, but the ALJ denied the County full party status, to avoid undue broadening of the issues or unwarranted delay.

It is within the ALJ's sound discretion to limit participation of intervenors in an appropriate manner. The limit on San Mateo's participation (submission of written pleadings and briefs) was appropriate; and the County has failed to demonstrate any abuse of discretion or any harm resulting from the ALJ's refusal to permit the County to offer witnesses or cross-examine witnesses of other parties.

E. Certification Challenge/Discovery

FAA Counsel and SAT assert error by the ALJ in a series of rulings permitting the Commission to challenge the validity of the FAA's determination that the Q707 complies with Stage 2 certification requirements. SAT also objects to the ALJ's permitting the introduction of evidence on prior FAA certification determinations.

The ALJ also authorized substantial discovery relating to FAA certification processes and data, including issuance

of subpoenas against private manufacturers (the Boeing Company and Shannon/Tracor, manufacturer of the retrofit hush kit used on Q707s).[12]

FAA Counsel and SAT contend that allowing this challenge to the validity of the FAA's certification data, and the associated discovery, was unwarranted; that it resulted in unnecessary expansion of the proceeding; and that it improperly transformed the proceeding from a noncompliance and default case involving alleged breaches of contractual obligations into a hearing on the correctness of FAA noise determinations, a matter acknowledged as Federally preempted.

Section 611(b)(1) of the Federal Aviation Act of 1958 (FAAct), as amended by the Noise Control Act of 1972, provides that the FAA, after consultation with the Secretary of Transportation and the Environmental Protection Agency, "shall prescribe and amend standards for the measurement of aircraft noise. . ." Section 611(b)(2) prohibits issuance of an original type certificate unless the Administrator has prescribed standards and regulations which apply to such aircraft and which protect the public from aircraft noise consistent with the highest degree of safety in air commerce or air transportation.[13] Thus, the plain words of § 611 make clear the exclusive authority of

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[12] The Initial Decision describes this process: The Commission was given liberal permission by the judge over the vigorous objection of other parties to probe into the certification processes. . . . Liberal discovery by the Commission was permitted against the Federal Aviation Administration. Every opportunity was given the Commission to show that the Q707 was noisier on takeoff at full thrust and maximum takeoff weight than the FAA contends. By the subpoenas to Boeing, the Commission was allowed to try to establish that other Boeing aircraft were noisier than shown by FAA's records." Initial Decision at 9-10.

[13] Section 611(b) should be read in conjunction with § 603, which authorized the FAA Administrator to issue type certificates, and § 609, which provides that only the Administrator may re-examine or investigate Part 36 certificates.

the FAA to set the standards for the measurement of aircraft noise and to establish specific noise standards for the certification of aircraft.

The legislative history of section 611, described in *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), indicates the FAA's exclusive authority for noise measurements and aircraft certifications, confirming Federal preemption of state and local actions involving the measurement of aircraft noise and certification:

> The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U.S.C. § 1348(a), and the protection of persons on the ground. 49 U.S.C. § 1348(c). Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest degree of safety." 49 U.S.C. § 1431(d)(3). The interdependence of these requires factors a uniform and exclusive system of federal regulation if the congressional objectives outlined in the Federal Aviation Act are to be fulfilled.

Id. at 638-39.

Section 611 expressly permits local airport noise regulation by proprietors; however, local authority to regulate does not extend to the Federally preempted areas of standards for noise measurement or certification of aircraft.[14] Moreover, as the Supreme Court noted in *Burbank*, 411 U.S. at 635, n. 14: "Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory."

In these circumstances, I find that the ALJ improperly enlarged the scope of this proceeding, thereby permitting

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[14] Challenges to the certification of an aircraft type may be raised by filing a complaint with the Administrator, pursuant to § 1002(a) of the FAAct; however, the Commission never did so.

the Commission to challenge the FAA's noise standards for certification of the Q707, a Federally preempted subject matter.

I have also concluded that the ALJ erred in allowing the extensive discovery which took place in this case and in admitting evidence that sought to dispute the FAA's noise determinations. Although, as a practical matter, this error is legally harmless, since the data adduced by the discovery and introduced into evidence at the hearing, did not reveal any discrepancies in the FAA's determination of the noise levels of the Q707 or the other aircraft with which it was compared, there is, nonetheless, reason to be concerned about the effect the ALJ's discovery rulings may have on future cases. The broad discovery authorized by the ALJ is one of the principal reasons why this case has taken so long, and it is now clear that this discovery was totally unnecessary. More important, in view of the FAA's statutory responsibilities in the areas of aircraft certification and noise control, considerable deference should be shown to its noise determinations; and discovery should be limited to situations where the requesting party demonstrates reason to believe the FAA's data and conclusions are incorrect. No such demonstration was made here.

III. ALJ'S INITIAL DECISION

On August 9, 1988, the ALJ issued his Initial Decision ("I.D."), finding that the Commission's exclusion of Burlington's Q707s was a violation of Assurance No. 20 of grant agreements entered into with the FAA under the 1970 Act, for the reason that the Commission had failed to operate the airport for the use and benefit of the public on fair and reasonable terms and without unjust discrimination. However, consistent with his earlier ruling concerning the scope of his jurisdiction under Part 13, the ALJ refused to extend this finding to assurances of grant

agreements the Commission had entered into under the 1982 Act.

The ALJ based his decision on record evidence demonstrating that Stage 2 aircraft as noisy as, or noisier, than the Q707 had been permitted to operate at SFIA, and that these types of aircraft were allowed to commence and continue operations at SFIA under the Commission's regulations, while the Burlington Q707 was excluded. I.D. at 7-11.

The ALJ further noted that notwithstanding liberal permission to the Commission, over the vigorous objections of other parties, to inquire into the FAA's noise certification of the Q707, the Commission had failed to show any substantial flaw in the way the FAA had determined the noise levels of the aircraft, with or without thrust cutback. I.D. 9-11.

Because the question of what constitutes an unfair, unreasonable or unjustly discriminatory action on the part of an airport proprietor, under the 1970 and 1982 Acts and related regulations, in excluding a particular aircraft type is a case of first impression for the FAA, the ALJ properly looked to relevant Federal case law, particularly, the Second Circuit Court of Appeals' decisions in the so-called *Concorde Cases* (*British Airways Board v. Port Authority of New York and New Jersey*, 558 F.2d 75 and 564 F.2d 1002 (2d Cir. 1977) (Port Authority's exclusion of the supersonic Concorde from operating at New York's John F. Kennedy Airport in the late 1970's was unreasonable and discriminatory because that aircraft satisfied the noise standards that the Port Authority had applied to subsonic aircraft).

The ALJ rejected the Commission's contention that its actions in excluding the Q707 were justified because it had a "rational belief" that the Q707 was noisier than other Stage 2 aircraft and, thus, exclusion would reduce possible liability and enhance the quality of the environment, citing

a footnote in *Santa Monica Airport Association v. City of Santa Monica*, 659 F.2d 100, 104, n. 5 (9th Cir. 1981). However, the ALJ stated that it was not enough that the Commission may have "rationally believed" that the classifications in its regulations might reduce the possibility of liability or enhance the quality of the environment. Rather, the ALJ concluded that these classifications must, in fact, be capable of achieving these purposes under an objective, not subjective, standard. I.D. at 19.)

Applying this standard to the proceeding, the ALJ concluded that the Commission's Resolutions did not bear a "rational relationship" to the twin goals that were outlined in the *Santa Monica* case. Specifically, he noted that the exclusion of the Q707 would not, in fact, reduce the Commission's financial liability, or improve the environment, because it was continuing to allow noisier planes to operate at SFIA. I.D. at 16-18.

The ALJ also rejected the Commission's arguments that it was permissible to "ratchet down" the noise at SFIA by addressing noise problems on a piecemeal basis and that its exclusion of the Q707 was part of a legitimate form of "grandfathering," whereby existing carriers would not be disturbed, but new entrants would be excluded; and comparable grandfathering had been upheld by the courts in cases arising under the Equal Protection Clause. I.D. at 23-25.

The ALJ further found that Burlington's decision not to seek a variance under the Commission's new 1988 Resolution did not preclude a finding that the 1988 Resolution was violative of Assurance No. 20. The ALJ noted that there is a limit beyond which Burlington no longer should be required to exhaust its administrative remedies. I.D. at 34-35.

Based on his determination that the Commission's actions violated Assurance No. 20, the ALJ ruled that the FAA could continue to withhold the Commission's funding

under the grant agreements entered into under the 1970 Act. However, consistent with his earlier rulings regarding the scope his jurisdiction under 14 C.F.R. Part 13, the ALJ refused to approve the withholding of funds under grants that had been entered into under the 1982 Act. The ALJ also declined to address the issue of whether the current temporary suspension of approval of the Commission's grants subsequent to July 7, 1986 should be affirmed. I.D. at 37-40.

IV. APPEAL OF INITIAL DECISION

The Commission appeals the ALJ's determination that the Commission's exclusion of Burlington's Q707 aircraft, on the ground that the Q707 aircraft type had not been certificated as Stage 2 compliant and operated at San Francisco International Airport prior to January 1, 1985, as required by Commission Resolution[15], while at the same time permitting noisier or equally noisy aircraft models to continue or commence operations at the Airport, violated Assurance No. 20 of grant agreements entered into between the Commission and the Federal Aviation Administration, under the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 *et seq.*, which require the Commission to operate the Airport for the use and benefit of the public on fair and reasonable terms and without unjust discrimination.

The Commission also appeals the ALJ's determination that continued exclusion of the Burlington Q707 aircraft under Commission Resolution 88-0016 (January 22, 1988) violated Assurance No. 20 of the grant agreements in the

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[15] Included within this finding of unjust discrimination is the ALJ's subsidiary determination that the Commission violated Assurance No. 20 by its refusal to grant a waiver of Resolution 78-0131 on the basis that the Q707 was significantly louder in takeoff mode than any other aircraft permitted to operate at SFIA. The record demonstrated that the Commission was incorrect.

same unfair, unreasonable, and unjustly discriminatory manner.

The Commission contends that the ALJ's findings are erroneous and result from a failure to properly apply the "rational basis" test, commonly used in challenges brought under the Equal Protection Clause of municipal regulations promulgated under police powers, to review the airport noise abatement regulations. The Commission asserts that under the rational basis standard, its exclusion of the Q707, pursuant to Resolution 78-0131, on the grounds that it was not Stage 2 certificated until after January 1, 1985, is rationally related to a permissible purpose—the Airport's control of noise, particularly cumulative noise. Comm. Br. at 19-22.[16] Moreover, asserting that its noise abatement resolutions are nothing more than "economic regulations" (citing *Santa Monica Airport Ass'n v. City of Santa Monica*, 481 F. Supp. 927, 935 (C.D. Cal. 1979), aff'd 659 F.2d 100 (9th Cir. 1981)), similar to regulations commonly enacted by municipal authorities under their police powers (for the health and welfare of citizens), the Commission also argues that its decision not to grant Burlington a

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[16] Contrary to the Commission's assertions on brief that exclusion of the Q707 was based on its policy of reducing cumulative noise impact, the record reveals that the Commission's exclusion of the Q707 was based on its determination that the aircraft was louder in takeoff mode than any other aircraft at the Airport. The ALJ found that the evidence showed this determination was incorrect, and the Commission has apparently abandoned its contention that the aircraft's takeoff noise exceeded that of all other aircraft at SFIA. Indeed, the Commission concedes the correctness of the Initial Decision's factual findings that during the period the Q707 has been denied permission to operate at the Airport, 15 other models of aircraft, emitting as much or more noise than the Q707, have been permitted to operate there; and that operators of these airlines have been permitted to increase the number of flights with these aircraft types. The Commission also does not dispute that at least 560 takeoffs and landings are performed each month at SFIA by six aircraft models noisier than the Q707. I.D. at 10-11.

waiver of its Resolution excluding Stage 2 aircraft certificated after January 1, 1985 must be found reasonable and non-discriminatory under the Equal Protection Clause's rational basis test because of the Commission's belief that the classification expressed by the resolution was rationally related to a permissible goal of abating airport noise. Comm. Br. at 27-28.

Relying on *New Orleans v. Dukes*, 427 U.S. 297 (1976), the Commission asserts that under the rational basis test, deference to its "legislative" determination regarding the desirability of its noise classification is required.[17] In *Dukes*, the Supreme Court describes the rational basis test for Equal Protection Clause challenges to municipal regulations enacted under police powers, holding that unless the classification trammels fundamental personal rights or is based on inherently suspect distinctions, the constitutionality of such a classification is established with a showing only that it is rationally related to a legitimate governmental interest. *Id.* at 303. Given that test, the Commission asserts, its classifications under Resolution 78-0113 cannot be found unreasonable, arbitrary, or discriminatory.

The Commission's reliance on the rational basis test is misplaced; and the fundamental error of the Commission's argument is nowhere better demonstrated than by *Dukes*. As the Court explains, the rational basis test applies only

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[17] The Commission argues that its legislative classifications, *i.e.*, noise abatement resolutions, are entitled to the deference traditionally accorded legislative classifications enacted by Congress or state legislatures. This assertion is no more than another aspect of the Commission's misplaced reliance on Equal Protection Clause principals as the proper standard for review of its resolutions. The question is not the deference to be afforded the resolutions, but rather whether the Commission violated its contractual obligations by passing a discriminatory resolution and applying it to exclude an operator from SFIA in an arbitrary and unreasonable way. Put another way, this proceeding is not a challenge to the Commission's capacity to promulgate resolutions, but rather an examination of whether that resolution is related to discriminatory behavior violative of a contractual obligation.

to Equal Protection Clause challenges to regulations promulgated under a municipality's police powers; the test is not valid where the challenged regulation was promulgated under other authority:

> We emphasize again that these principles, of course, govern only when no constitutional provision other than the Equal Protection Clause itself is apposite. Very different principles govern even economic regulation when constitutional provisions such as the Commerce Clause are implicated, or when local regulation is challenged under the Supremacy Clause as inconsistent with relevant Federal laws or treaties.

427 U.S. 304, n. 5.

In fact, the Commission's noise control regulation implicates both the Supremacy Clause (*see, e.g., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973)), and the Commerce Clause (*see, e.g., Santa Monica Airport Ass'n v. City of Santa Monica, supra*; *Concorde Cases*, 558 F.2d 75 and 564 F.2d 1002 (2d Cir. 1977); Initial Decision at 16). It is well settled that the pervasive Federal scheme of regulation of airspace and air carriers, including noise control, preempts conflicting state and local laws. *Burbank, supra*, at 625. Similarly, state and local noise regulations found to be burdensome on interstate commerce are deemed in conflict with the Commerce Clause and are also invalid. *Santa Monica*, 481 F. Supp. at 937, quoting *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

However, within the Federally preempted control of aviation, Congress has concluded and the courts have consistently held that airport proprietors retain the authority and responsibility to regulate local operation of their airports, including noise, as long as there regulations are "reasonable, nonarbitrary, and nondiscriminatory." *Burbank*, 411 U.S. at 635-36, n. 14, and 649; *British Airways v. Port Authority of New York (Concorde I)*, 558 F.2d 75,

84; *British Airways v. Port Authority of New York (Concorde II)*, 564 F.2d 1002, 1011 (2d Cir. 1977).

Thus, the promulgation of noise control regulations and actions pursuant to those regulations by the Commission under this "proprietor exception" is properly reviewed by determining whether they are reasonable, arbitrary, and discriminatory[18]; not by the rational basis test applicable to Equal Protection Clause challenges.

Consequently, the Commission's argument that the ALJ erred by applying an improper standard of review is with-

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[18] At the heart of the Commission's assertions of error regarding the Initial Decision's finding of discrimination, perhaps at the heart of this protracted dispute, is the Commission's apparent misunderstanding of the scope of its authority to regulate airport noise under the "proprietor's exemption." The Commission contends that as a proprietor, it has the authority to independently evaluate the noise levels of aircraft in regulating airport noise; and, despite conceding the FAA's authority and responsibility to certificate aircraft compliance with Part 36 noise standards, asserts that it is not precluded from independently assessing aircraft noise levels and denying access to SFIA on the basis of those assessments. Comm. Br. at 47-48. The Commission is simply wrong. While is can regulate permissible levels of noise created by aircraft using SFIA, this local regulatory control does not include the power to invade federal regulation—in this case, the establishment and certification of aircraft noise levels. Nor does is include the power to discriminate. Thus, the Commission could bar all aircraft noisier than Q707s, or establish a curfew for such aircraft, but it cannot deny access to a Q707 Stage 2 aircraft, when other similarly certificated aircraft are permitted to serve the airport, on the grounds that the Commission's independent assessment of the Q707's noise levels led it to conclude that the Q707 was noisier than the other aircraft. In support of its contention that it may independently evaluate noise levels as a proprietor, the Commission misconstrues 14 C.F.R. § 36.5, which states that: "[n]o determination is made [under Part 36], that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, an airport." This regulation is not the source of proprietor authority to independently assess aircraft noise levels. Rather, consistent with local regulation of airport noise, § 36.5 simply says that no airport must accept aircraft solely on the basis of Part 36 certification.

out merit. Although the ALJ may have had some confusion about the scope of the Commission's noise control authority, the ALJ properly understood that the issue to be resolved was whether the Commission's actions were discriminatory, as demonstrated by the evidentiary record and application of appropriate decisional law. In this respect, the ALJ's reliance on the *Concorde Cases* was proper.

In making the determination that unjust discrimination in violation of Assurance No. 20 was occurring, the ALJ found first that the Commission excluded the Q707 under its 1978 Resolution on the grounds that it had been retrofitted to comply with Stage 2 standards after January 1, 1985. The ALJ further found that the Commission continued that exclusion under its 1988 Resolution on the grounds that the Q707 was not a type of Stage 2 aircraft that had been operating at SFIA on or before January 1, 1985.[19]

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[19] The Commission offers a number of arguments in support of its 1978 and 1988 Resolutions that serve to illuminate only the Commission's singular understanding of the nature and extent of its proprietor exemption for noise control. For example, the Commission contends that the factual findings of its April 15, 1986 waiver denial are preclusive for purposes of this Order's determination of whether the Commission violated its grant assurances. The Commission, however, misdefines this case. The issue to be decided is not whether the Commission should have granted the waiver, but whether the Commission has violated the terms of its grant assurances. Thus, the question of the accuracy or completeness of submissions by parties to the Commission during the waiver process are irrelevant, as are the specific fact findings associated with the waiver process. Neither affects the proceeding's examination of all facts related to the question of discriminatory behavior in violation of grant assurances. Moreover, as fact finding, the April 15, 1986 waiver denial stands only for the proposition that the Commission's denial of the Q707 waiver rests on facts demonstrated to be untrue by uncontroverted evidence in the instant proceeding. Finally, the Commission's contentions regarding its 1988 Resolution do not require significant further consideration. Initially, the Commission argued that having repealed its 1978 resolutions through passage of its 1988 Resolution, this proceeding had been mooted and

Exclusion of the Q707 based on the date of modification, rather than the date of complying operation is neither rational nor reasonable. The date of retrofit is irrelevant to the amount of noise an aircraft emits. Moreover, the Commission's 1978 Resolution states that it incorporates FAR Part 36 and the implementation schedule of FAR Part 91, but these regulations do not distinguish among aircraft by date of retrofitting.

In addition, the ALJ found the reason offered by the Commission for its exclusion of the Q707 by its denial of waiver to be arbitrary and unreasonable. The Commission denied a waiver on its conclusion that the Q707's compliance with Part 36 Stage 2 standards was insufficient because compliance was achieved by using thrust cutback on takeoff and a decibel tradeoff among the measuring points. Use of cutback and tradeoff are specifically permitted by Part 36 to achieve Stage 2 compliance,[20] and exclusion of

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should be dismissed. In addition, the Commission also contends that Burlington failed to exhaust its administrative remedies by not seeking a waiver from the 1988 Resolution, and thus filed its complaint prematurely with the FAA. Even if exhaustion principals applied in the context of this alleged violation of Federal law, there is, as the ALJ found, a limit beyond which a litigant need not continue to engage in a process where there is no realistic hope for the sole purpose of exhausting administrative remedies. No one can doubt Burlington's serious efforts to commence operations with its Q707s at SFIA—an effort to which it has devoted more than three years without success. Moreover, the Commission fails to indicate, in any manner, that it would have ruled more favorably on requested waiver of its 1988 Resolution, than it did when it turned down Burlington's requested waiver of the 1978 Resolution.

[20] The use of tradeoffs and cutbacks to demonstrate compliance with Stage 2 standards is also addressed in § 305 of the Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. § 2125 *et seq.*, which provides: "Notwithstanding any other provision of law, or any rule or regulation or order. . . the provisions contained in Appendix C of Part 36 of Title 14. . . [thrust cutbacks on takeoff and decibel tradeoffs] shall apply in determining whether any aircraft complies with the provisions of Subpart E of Part 91. . . ."

an aircraft type that complies with Stage 2 solely for the reason that compliance is achieved through the use of these provisions is inconsistent with Part 36 and, as the ALJ found, discriminatory. In fact, the evidence adduced in this proceeding shows that many models of certain of the aircraft types permitted to operate at SFIA utilize these provisions of Part 36 to achieve Stage 2 compliance, and that approximately 60% of all departures from the Airport in 1985 were performed by these aircraft types. FAA Counsel Notice, Exh, 14. Thus, the ALJ found that there was no discernible, rational basis for the treatment afforded the Q707 that was justified by the manner in which it achieved compliance with Stage 2 standards. Even considering only takeoff noise, the ALJ also found that 15 as noisy, or noisier, aircraft models were permitted to operate at the Airport. Exclusion of the Q707 in these circumstances made absolutely clear the Commission's arbitrary and discriminatory action. Initial Decision at 10-11.

The Commission's attempts to justify its actions by contending that in addressing the Airport's "cumulative noise" problem, it is permitted to "grandfather" other Stage 2 aircraft types already operating at SFIA, but deny access to similarly situated new applicants, under decisional authority permitting regulation by "racheting down," relying on *New Orleans v. Dukes*, *supra*, and other cases upholding step-by-step legislative classifications promulgated pursuant to municipal police powers.[21]

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[21] "Racheting down," or a gradual approach, has been held constitutionally permissible, *see generally, Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) with respect, again, to local economic regulations challenged under the Equal Protection Clause. *New Orleans v. Dukes*, 427 U.S. at 303-305. As previously noted, the Commission's reliance on these cases is misplaced; Moreover, even were step-by-step or "racheting down" permissible, the method employed by the Commission in arguable pursuit of that practice cannot survive scrutiny under a reasonable, nonarbitrary, and nondiscriminatory test. *Global International Airways v. Port of Authority*, 727 F.2d 246 (2nd Cir. 1984), upon which

The Commission's so-called "grandfathering" of all existing Stage 2 compliant aircraft at SFIA, while excluding a similarly compliant new entrant, is arbitrary and discriminatory. In this situation, the term "grandfather" is a misnomer, obscuring the plain fact that the only change is exclusion of a new entrant—an entrant less noisy than many of the "grandfathered" aircraft.

In sum, the authority of airport proprietors to regulate aircraft noise is neither immune from scrutiny nor unlimited in scope, but subject to well-established restraints. The proprietor must exercise this authority reasonably, in a manner rationally related to achieving noise control, and through nonarbitrary, nondiscriminatory regulations that do not conflict with Federally preempted law or create a burden on commerce.

After review of the record, the Initial Decision, and the briefs of all parties, I have concluded that the ALJ's finding that the San Francisco Airport's Commission's exclusion of the Burlington Q707 was unjustly discriminatory and, thus, a violation of assurances contained in grant agreements between the Commission and the FAA, which require the Commission to operate the Airport on fair and reasonable terms and without unjust discrimination, is supported by the record. Similarly, I have concluded that the record supports the related finding that continued exclusion of the Q707 by the Commission pursuant to Resolution 88-0016 also violates the relevant assurances for the same reasons.

Therefore, I find that since October 17, 1985, and continuing to date, the Commission has been and remains in

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the Commission relies, is not to the contrary. There, the court agreed that the power of states and localities to establish requirements regarding noise created by aircraft using their airports included the right to deny the use of an airport to an aircraft, but only on the basis of nondiscriminatory noise criteria. *Id.* at 251.

noncompliance and default of its grant agreement assurances by reason of its failure to operate SFIA on fair and reasonable terms and without unjust discrimination.

V. REMEDY

The ALJ concluded that the appropriate remedy for the Commission's violation of Assurance No. 20 of grant agreements under the 1970 Act was confirmation of the FAA's continuing suspension of funding under those grant agreements. This suspension had commenced with issuance of the July 7, 1986 Notice, and applied to funding beginning that date. However, on the basis of the ALJ's August 13, 1987 ruling that he had no jurisdiction to consider charges under the 1982 Act, the ALJ expressly declined to address the question of whether the temporary suspension of approval of 1982 Act Commission grant applications submitted after July 7, 1986 should also be affirmed.

While I affirm the remedy recommended by the ALJ under the 1970 Act, I find that the ALJ improperly declined to address the issue of the FAA's suspension of pending or future grant approvals. Under current law, grants may not be approved unless the sponsor (here the Commission) makes satisfactory assurances prior to grant approval that it will operate an airport on "fair and reasonable terms and without unjust discrimination." *See* 49 U.S.C. § 2210. Since the ALJ concluded that the Commission had violated this standard, he should have affirmed the refusal to approve the Commission's grant applications until the Commission modified its behavior, as, in the face of continuing discrimination, the prerequisite approvals upon assurances of non-discriminatory behavior cannot be made. Regardless of whether the Commission's actions violated the assurances in grant contracts entered into under the 1982 Act, the finding under the 1970 Act that the Commission is continuing to discriminate against Burlington by excluding the Q707 warrants, in fact necessitates, the disapproval of pending and future grants until and

unless the Commission cures the discrimination found by the ALJ and affirmed in this Decision and Final Order.

FAA Counsel has not sought to withhold reimbursement of expenditures incurred by the Commission in connection with grant contracts previously entered into (under either the 1970 or 1982 Acts). Rather, the relief sought is prospective and preventive: to withhold approval of new grants during the period the Commission persists in discriminating. It is appropriate, and I have determined to grant it.[22]

ACCORDINGLY, pursuant to 14 C.F.R. § 13.20; and the authority contained in sections 313(a) and 1006 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1354(a) and 1486; sections 18 and 27 of the Airport and Airway Development Act of 1970, 49 U.S.C. §§ 1718 and 1727; and sections 509(b)(1), 511(a)(1), and 519 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. §§ 2208(b)(1), 2210(a)(1).

1. I find that the exclusion by the San Francisco Airports Commission under its Resolutions 78-0131 and 88-0016 of the Q707 aircraft of Burlington Air Express from San Francisco International Airport to be a violation of the assurances in the grant agreements entered into between the City and County of San Francisco and the Federal Aviation Administration under which the City and County of San Francisco agreed to operate that airport for the use and benefit of the public on fair and reasonable terms and without unjust discrimination.

2. I affirm and finalize the temporary suspension of approvals of applications by the City and County of San Francisco for grant funds that has been in place since July 7, 1986 on the basis that the City and County of San Francisco has not provided satisfactory assurances that it

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[22] Thus, there is no need to remand issues regarding compliance with the 1982 Act and associated grants to the ALJ, since the relief granted by this decision would not be affected by the outcome of such a remand.

will operate the San Francisco International Airport for the use and benefit of the public on fair and reasonable terms and without unjust discrimination.

3. I direct that no further applications for grant funds under the Airport and Airway Improvement Act of 1982 at the San Francisco International Airport shall be approved until the Commission complies with its grant obligations.

4. Except as specifically reversed or modified herein, I affirm the Initial Decision (served August 12, 1988) of Chief Administrative Law Judge William A. Kane, Jr. issued in this proceeding.

/s/ T. Allan McArtor
T. ALLAN McARTOR
ADMINISTRATOR

12/12/88
Date

APPENDIX D

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

DOCKET NO. 13-86-2
(FAA Enforcement)

IN RE SAN FRANCISCO AIRPORTS COMMISSION

INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE WILLIAM A. KANE, JR.*

Served Upon:

Steven S. Rosenthal, Morrison & Foerster, Suite 5500, 2000 Pennsylvania Avenue, N.W. Washington, D. C. 20006, for San Francisco Airports Commission.

John W. Simpson, Kelley, Drye & Warren, Suite 600, 1330 Connecticut Avenue, N.W., Washington, D.C. 20036, for Burlington Air Express.

Porter Goltz, Deputy County Counsel, County of San Mateo, County Government Center, Redwood City, California 94063.

Robert Silverberg, Condon and Forsyth, 1100 15th Street, N.W., Washington, D.C. 20005, for Airborne Express and Southern Air Transport.

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* This Initial Decision is rendered pursuant to authority delegated to the administrative law judge under the Rules of Practice for Federal Aviation Administration hearings (14 CFR 13.37). A party may appeal this decision by filing a Notice of Appeal with the Administrator of the Federal Aviation Administration within 20 days after the date of service hereof pursuant to 14 CFR 13.20(g).

Stephen A. Alterman, Executive Vice President & General Counsel, Air Freight Association, 1710 Rhode Island Avenue, N.W., Washington, D.C. 20036

Richard W. Danforth, Manager, Airports and Environmental Law Branch, Office of the Chief Counsel, Federal Aviation Administrations, 800 Independence Avenue, S.W., Washington, D.C. 20591.

Found:

1. That the exclusion by the San Francisco Airports Commission of the Q707 aircraft of Burlington Air Express from the San Francisco International Airport is a violation of Assurance No. 20 of the grant agreements entered into between the San Francisco Airports Commission and the Federal Aviation Administration under the Airport and Airway Development Act of 1970 in that the Commission thereby failed to operate the airport for the use and benefit of the public on fair and reasonable terms and without unjust discrimination.

2. That the continued exclusion of the Q707 aircraft from the airport issued under Resolution 88-0016 of the San Francisco Airports Commission January 22, 1988, also violates Assurance No. 20 of the said grant agreements for the same reasons.

3. That the actions of the Federal Aviation Administration withholding grant funds for failure to comply with Assurance No. 20 of the grant agreements entered into under the Airport and Airway Development Act of 1970 are affirmed.

[Table of Contents Omitted in this printing]

INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE WILLIAM A. KANE, JR.

I. Introduction

This proceeding was initiated by the filing on July 7, 1986, by the Assistant Chief Counsel of the Federal Aviation Administration (FAA Counsel) of a Notice of Proposed Cease and Desist Order. The Notice, which was filed under the FAA Investigation and Enforcement Procedures, 14 CFR Part 13, charged the San Francisco Airports Commission (Commission) with violation of various statutes and grant agreements entered into between FAA and the Commission for failure to permit Burlington Air Express, Inc. (Burlington), a certificated air carrier of cargo, to operate Stage 2-compliant Boeing Q707 aircraft which it leased from Southern Air Transport, Inc. (SAT), at San Francisco International Airport (SFIA). The undersigned was assigned to the proceeding on August 27, 1986.

Little significant action occurred on the record in the case for the next seven months while FAA Counsel, the Commission, and various prospective interveners, including Burlington, attempted to stipulate various matters in order to expedite the proceeding. They were able to reach a stipulation of various procedural matters which the judge adopted, but they failed to reach any stipulations of fact. On March 17, 1987, a petition by Burlington to intervene as a full party was granted. At the same time, the Air Freight Association, Airborne Express, Southern Air Transport and the County of San Mateo were granted the right to intervene not as full parties but on a limited basis.

On March 13, 1987, the Commission filed a motion to dismiss or strike FAA's Notice of Proposed Cease and Desist Order. FAA Counsel and Burlington filed replies to this motion and all three parties filed sur-replies. On August 13, 1987, the undersigned issued an order granting in part the Commission's motion to dismiss and ordering the case to proceed to hearing on one of the issues.

Petitions for reconsideration of that order were filed and on November 3, 1987, the judge vacated much of the August 13, 1987 order. As formulated by the judge in the November 3, 1987 order, and pursuant to an amendment to the FAA Counsel's July 7, 1986 Notice authorized by the judge,[1] the issues being tried in this care are (1) whether the actions of the Airports Commission between October 17, 1985 and April 15, 1986, excluding the Burlington Q707 from SFIA on grounds that an aircraft of its type had not been certificated as Stage 2-compliant and operated at SFIA before January 1, 1985, while permitting other noisier aircraft to continue and commence operations at SFIA was unfair and unreasonable and unjustly discriminatory within the meaning of Assurance No. 20 of the grant agreements entered into between the Commission and the Federal Aviation Administration under the Airport and Airway Development Act of 1970, and (2) whether the Commission's subsequent adoption of Resolution 88-0016 of January 22, 1988, continuing to exclude that aircraft under the same circumstances also violates Assurance No. 20.

The proceedings in this case have been unusually lengthy. There was oral argument on motions before the administrative law judge (ALJ) in November 1987. There was a two-day prehearing conference on February 9-10, 1988, and a further prehearing conference on March 21, 1988. There have been a large number of motions and orders and extensive discovery has taken place in Washington and at various locations on the West Coast. Subpoenas issued by the ALJ have been enforced by the U.S. District Court for the District of Columbia. Eight days of hearing were held before the administrative law judge in San Francisco, California, between May 2 and May 11,

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[1] In the amendment, FAA Counsel withdrew its request for a cease and desist order and confined the requested relief to affirmation of its action withholding of suspending grant funds.

1988, at which 20 witnesses were heard. These included leading aviation acoustical experts within the Federal Government testifying on behalf of FAA Counsel and outside of the government testifying on behalf of Burlington and the Commission. Briefs were filed on May 26, 1988.

Burlington and FAA Counsel take the position that the Commission's actions violate Assurance No. 20. The Commission denies the violation on the grounds set forth below. SAT, owner of the Q707s, who leases them to Burlington, endorses Burlington's position, but has also filed a brief vigorously excepting to the scope of discovery and inquiry permitted by the administrative law judge into the certification basis of the Q707. The County of San Mateo filed a brief strongly endorsing the Commission's exclusion of the Q707. The matter is now ready for decision by the administrative law judge.[2]

II. Background

In November 1984 SAT on behalf of Burlington acquired eight previously-owned B707-300 series cargo aircraft. Six of these had been out of operation prior to their sale to SAT (Ex. BAX-PH-204). SAT's plan was to retrofit the aircraft with hush kits to be furnished by the Tracor/ Shannon Companies. On March 6, 1985, FAA issued a supplemental type certificate for the first of SAT's retrofitted aircraft finding that it complied with the Stage 2 noise standards contained in FAR Part 36. By April 16, 1985, seven of these aircraft, now designated as Q707s, had been fitted with the hush kits (Notice Ex. 6) and certificated by FAA as Stage 2-noise compliant. On September 20, 1985, SAT filed an application with Louis A.

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[2] The decision will be reviewed by the Administrator of FAA who will receive advice in performing this function from the General Counsel of the Department of Transportation. FAA Counsel who prosecuted the case will not be involved in advising the Administrator on its disposition other than through any exceptions and brief they file in the public record.

Turpen, Director of San Francisco International Airport, for a waiver of the noise provisions of Resolution 78-0131 adopted by the Commission on May 17, 1978, to permit the operation of the aircraft at SFIA. SAT's proposal was to start operating the aircraft on behalf of Burlington by November 1, 1985 (Notice Ex. 6).

On October 17, 1985, in a two-page letter from Mr. Turpen the application for a waiver was denied (Notice Ex. 8). Citing Commission Resolution 78-0131, Mr. Turpen stated that the aircraft had been certificated by the FAA under FAR 36 as complying with Stage 2 only by using "tradeoff" and "cutback" procedures of FAR 36 and that its noise level at the takeoff measurement location was 2dB higher than the maximum authorized for Stage 2 compliance.[3] The letter of denial stated that the engine "cutback" permitted by FAA in certification tests is not mandatory for actual operations. In regard to the ordi-

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[3] Under the technical procedure prescribed by FAA in Part 36, the noise of a turbojet aircraft is measured at three locations: (1) the takeoff location (6,500 meters—about 3.5 miles) from the start of the takeoff roll, (2) the approach location (2,000 meters—about 1 mile) from touchdown, and (3) the sideline location (.35 nautical miles) from the extended runway centerline where the noise level after liftoff is greatest (14 CFR C36.1).

The FAA regulations contain two provisions to enable an aircraft which is otherwise too noisy to meet the Stage 2 standards. First, in the course of the certification test, the aircraft may utilize "thrust cutback" on takeoff. This provision which is contained in 14 CFR C36.7(c) permits the pilot to cut his power back at a certain point in the takeoff (between 700 and 1,000 feet of altitude) thus permitting the aircraft to make less noise [sic] as it passes over the microphones on the ground measuring the sound. The second relevant provision of the FAA Regulation (14 CFR C36.5(b)) provides that if the measurement at one of the three measurement points exceeds the prescribed standard, a 2dB "tradeoff" is permitted. Therefore, if one measure (such as takeoff noise) is above the standard and another measure (such as approach noise) is below the standard, the operator may "tradeoff" up to 2dB of the amount the approach noise is below the standard in order to get below the takeoff noise limit.

nance on "tradeoff," the Commission asserted that this aircraft's exceedance of the maximum Stage 2 noise level in the takeoff mode is greater than the exceedance in that mode by any other aircraft at SFIA. Mr. Turpen's October 17, 1985, letter further stated that the Commission was under a variance from the State of California Department of Transportation, a condition of which was that there be no increase in the airport's noise impact level.

Other letters were exchanged between the Commission, FAA officials, and Burlington, between October 17, 1985, and April 15, 1986. During this time the Airport Director adopted Airport Operations Bulletin 85-07-AOB (Notice Ex. 12) providing, in effect, that no waivers would be granted for any aircraft which relied on cutback or tradeoff to meet the Stage 2 noise standard on takeoff despite the fact FAA permitted such reliance. There were meetings between Burlington and the Director of San Francisco Airport. Offers by Burlington to reduce the maximum takeoff weight of the Q707 on its proposed daily flight to its hub at Ft. Wayne, Indiana, from 322,300 pounds to 305,000 pounds and later to 290,000 pounds were not accepted by the Commission. There were letters of warning to the Commission by various FAA officials from the Western Region and from Washington affirming the validity of the cutback and tradeoff provisions under the FAA rules and warning that the Commission's refusal to accept Burlington's Q707 may be arbitrary, capricious and unjustly discriminatory under the applicable statutes and grant agreements.

On April 15, 1986, after a public hearing in March 1986, the Airports Commission issued Resolution No. 86-0073 finally denying Burlington's waiver application (Notice Ex. 16).[4]

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[4] The series of actions taken by the Commission commencing with Mr. Turpen's October 17, 1985 letter and culminating in the April 15,

After reciting various bases for the Commission's action, the April 15, 1986 Resolution contained this critical finding: "Whereas without the use of a thrust cutback, the Q707 is significantly louder in takeoff mode than any other aircraft permitted to operate at SFIA since January 1, 1985;" On May 1, 1986, Burlington requested reconsideration of Resolution 86-0073 on grounds of factual error as to the relative sound emissions by the Burlington aircraft compared to other aircraft permitted to operate at SFIA (Notice Ex. 17). On May 12, 1986, the petition for reconsideration was denied and July 7, 1986, FAA Counsel, on the basis of a complaint by Burlington, issued the Notice of Proposed Cease and Desist Order which instituted this case.

III. Noise Level of the Q707 Relative to Other Aircraft

The finding by the Commission in its April 15, 1986 Resolution as to the noise level of the Q707 relative to other aircraft has been shown by the record in this proceeding to have been wrong.

James E. Densmore, Deputy Director, Office of Environment and Energy, of the Federal Aviation Administration was FAA Counsel's main witness on the subject. He placed in the record his analysis of the takeoff noise level of the Q707 compared to other noisier aircraft (Densmore Ex. FAA-T-1, App. 2). Mr. Densmore's analysis shows the following:

1986 resolution of denial will be considered herein as a single action by the Commission, the ultimate effect of which was to exclude the Q707 from SFIA. As indicated in the November 3, 1987 order of the judge, no attempt will be made in this proceeding to parse out the effect of specific actions of the Commission during that period. Nor will there be any attempt to determine whether the Commission's actions excluding the Q707 were or were not consistent with its own Resolution 78-0131 of 1978. Lastly, there will be no effort to determine whether the Commission's action was required under variances granted by the California Department of Transportation.

COMPARISON OF TAKEOFF NOISE LEVELS OF THE Q707 v. OTHER AIRCRAFT

No.	Aircraft	MTOW	Engine	Takeoff Noise (EPNdB)
1	B-727-200	208,000	JT8D-17RQN	** 112.6 ##
2	B-727-200	203,100	JT8D-17QN	** 111.8 ##
3	B-727-200 (ADV) =	190,500	JT8D-15QN	** 109.8 #
4	B-747-200	812,000	JT9D-7FW/-7J	** 109.7
5	B-747-200 =	800,000	JT9D-7F	** 109.7
6	B-747-200	805,000	JT9D-7FW	** 109.4
7	B-747-100	750,000	JT9D-7FWET	** 109.4
8	B-747-100	750,000	JT9D-7F	** 109.4
9	B-747-100 =	734,000	JT9D-3A	** 109.4
10	B-747-200 =	785,000	JT9D-7A	** 109.3
11	B-747-200	800,000	JT9D-7J	** 109.3
12	B-747-200	767,000	JT9D-3A	** 108.6
13	B-747-200 =	775,000	JT9D-7F	** 108.6

14	B-747-100	710,000	JT9D-3A	** 108.4
15	B-747-100 =	750,000	JT9D-7A	** 107.8
16	* Q707	322,300	JT3D-3B	** 107.8

SOURCES:

* Shannon Engineering, Inc., Report JS-1146, "Quiet 707 Compliance with FAA Part 36 Noise Certification Standards."

** Full power takeoff.

\# Contained in Summary 707-727-737-747 Noise and Emission Reduction Activities, Boeing Commercial Airplane Company, Seattle, Washington 98124. April 1980.

Boeing data measured in accordance with 14 CFR Part 36 testing procedures.

= Aircraft which have actually operated at San Francisco International Airport since January 1, 1985 (Densmore testimony Ex. FAA-T-1, p. 16, Eldred Testimony p. 53).

As seen, in the certification tests conducted or approved by FAA, the Q707 at its maximum takeoff weight of 322,300 pounds and at full thrust (i.e., without any allowance for cutback) emits 107.8dB on takeoff. This is less noise than 3 models of the B727-200 aircraft, and 11 models of the B747 aircraft. It is just as quiet as one model of the B747. All of these 15 models of noisier or equally noisy aircraft were permitted by the Commission to continue or commence operations at SFIA by the Commission regulation and actions which resulted in the exclusion of the Q707. All of these 15 models of B727 and B747 aircraft are permitted to continue or commence operations at SFIA today under the Resolution adopted by the Commission on January 22, 1988, while the Q707 is excluded. As seen by the above table, 6 of the 15 noisier aircraft have actually operated at SFIA since January 1, 1985, while the Q707 has been excluded.[5]

The Commission argues that the Q707 will be louder on takeoff at SFIA than FAA's certification data suggests because pilots will not operate the aircraft on a day-to-day basis in the same manner that it was flown during FAA noise certification tests. It contends that the pilots will not "cut back" power on takeoff. The argument is irrelevant to this case because the same is true of all the other 15 models of noisier aircraft which the Commission permits to operate at SFIA.

The Commission was given liberal permission by the judge over the vigorous objections of other parties to probe into the certification processes and data of FAA and the

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[5] The Commission's stated reason for exclusion of the Q707 was solely its takeoff noise. The record shows that the Q707 at the takeoff weight which produces the loudest *sideline* noise is quieter than 14 models of other aircraft permitted to operate at SFIA. On *approach*, there are 43 aircraft models with certificated noise levels higher than the Q707 at its maximum permissible landing weight of 247,000 pounds (Densmore FAA-T-1 Apps. 4,5).

materials used by Shannon/Tracor to get the Q707 certificated by FAA. Substantial discovery was authorized and subpoenas were issued against the Boeing Company and Shannon/Tracor. Liberal discovery by the Commission was permitted against the Federal Aviation Administration. Every opportunity was given the Commission to show that the Q707 was noisier on takeoff at full thrust and maximum takeoff weight than the FAA contends. By the subpoenas to Boeing, the Commission was allowed to try to establish that other Boeing aircraft were noisier than shown by FAA's records. Despite all of this, the Commission failed on this record to disturb any of FAA's findings or certification data.[6]

The above chart shows 15 *models* of noisier aircraft permitted to operate. It does not show, and the record does not indicate, the precise number of aircraft in each model with the potential to operate into SFIA. The record indicates only that they are numerous (Densmore FAA-T-1, pp. 8-9).

The number of actual operations at SFIA by aircraft that are noisier than the Q707 was the subject of a substantial amount of testimony by a number of FAA witnesses. This showed that at least Northwest Airlines, Delta Airlines and United Airlines operated versions of the noisier aircraft into SFIA after January 1, 1985 (Ex. FAA-T-3). A Commission witness conceded that at least 560 takeoffs and landings are performed each month by the

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[6] The Commission was justified in insisting that the noise data on which the discrimination charge is based be expressed in the same terms for the Q707 as for the other aircraft to which it was being compared. Thus, is properly insisted that it be given the noise data for the Q707 at full power and not simply after allowance for cutback. The Commission also properly insisted that the Q707 be evaluated at its maximum allowable takeoff weight of 322.300 pounds and not at the 305,000 pound or 290,000 pound levels that Burlington proposed in successive offers of compromise. The Commission has no facilities to police any such weight limits.

six aircraft models noisier than the Q707 which have operated at SFIA.[7]

A development during the course of the hearing served to confirm the accuracy of FAA's determination of the Q707s noise level. The Commission provided an expert witness, Mr. Kenneth M. Eldred, who raised a question as to the validity of the FAA's 107.8dB noise rating for the Q707 aircraft at maximum takeoff weight without cutback. Mr. Eldred suggested that this figure was inconsistent with the results of a Boeing research and development study issued in February 1974[8] and that the actual noise level may be in excess of 110.2dB. A difference of that magnitude would represent a substantial increase in the noise perceived by persons on the ground.

During the weekend between the fifth and sixth days of the hearing in this case in San Francisco, the FAA's expert, James E. Densmore, Deputy Director of the Office of Environment and Energy of FAA, analyzed the 14-year-old Boeing study and returning to the witness stand on Monday disclosed that the study contained a basic flaw which resulted in a noise level 2.4dB higher than the test aircraft's actual noise level. The flaw in the Boeing study resulted from the fact that the study used noise levels from level flight tests across the test microphones and assumed that they were the noise levels for takeoffs across those microphones (Tr. 1565-6, 1622-3; FAA-H-100 and

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[7] Louis A. Turpen, Director of San Francisco International Airports, testified that the six aircraft models noisier than the Q707 which had operated at SFIA since January 1, 1985, perform approximately 560 takeoffs and landings a month at SFIA which amounts to 1.5 percent of the 38,000 takeoffs and landings from the airport each month (Turpen Direct SFO-T-1, p. 42).

[8] FAA JT3D Quiet Nacelle Retrofit Feasibility Program, February 1974, Final Report (Eldred Exhibit SFO-T-2, App. 2, p. 300). This study reported the results of a project conducted in 1973 by Boeing and financed by FAA in which a B-707 was fitted with experimental test engines treated to reduce noise and flown to determine the feasibility of retrofitting the B-707 fleet.

101). In fact, the Boeing tests included 8 actual takeoffs which averaged 109.2EPNdB at 349,000 pounds. The Boeing study erroneously used the number 111.6 instead of 109.2 (SFO-T-2, App. 2, pp. 110 and 287). When the right 109.2EPNdb is corrected to the current maximum gross takeoff weight of the Q707 of 322,300 pounds, the noise level of the Boeing experimental aircraft would have been 107.9EPNdB (FAA- H-101; Tr. 1622-4; SFO-29). The difference is one-tenth of an EPNdB from FAA's stated noise level of 107.8dB which Mr. Eldred agreed was insignificant (Tr. 1624).

The Commission, in effect, has withdrawn its challenge to FAA's 107.8 noise level for the aircraft. It now takes no position on the noise level of the aircraft at full thrust on takeoff (SFO- 31). Neither does it challenge the FAA's data on the noise levels of other aircraft cited in this case. The record, therefore, demonstrates conclusively that the Commission permits many aircraft to operate at SFIA which are as noisy or noisier than the Q707 which it excludes and that at least six of these aircraft have actually operated at the airport since January 1, 1985.

IV. The Legal Issues in the Case

As indicated in the November 3, 1987 order, in order to determine whether the Commission's actions excluding the Q707 were fair, reasonable and not unjustly discriminatory under Assurance No. 20 of the applicable grant agreements, this decision will look to the Federal Statutes and case law. It will do this as though this case were being brought before a federal court and as though no grant agreement were in existence. This is admittedly a novel technique for which no clear precedent has been found. There are several good reasons, however, for using this technique.

To begin with, it has been forced on this Tribunal as a matter of necessity. As set out in the August 13, 1987 order, there is no way that this Tribunal can directly reach

the Federal Statutes and case law which would normally govern the rights of the various parties to this case. The 1970 Airport and Airway Development Act has been repealed, the 1982 Airport and Airway Improvement Act and the grant agreements thereunder are out of reach because of the omission of the 1982 Act from the charter of this Tribunal by 14 CFR 13.20 of the regulations. The obligations remaining under the grant agreements negotiated pursuant to the repealed 1970 ADAP are the only grip this Tribunal has on the matters in dispute in this proceeding. Only by interpreting Assurance No. 20 can those matters be resolved.

In addition, reliance on the Federal Statutes and case law is the test that was announced by the undersigned in the Order of November 3, 1987. It is the basis which the Commission has accepted and upon which it has tried this case. FAA appears to have accepted it. While Burlington appeared initially to have concurred in the technique, is has presented arguments on brief which suggest that it now has a different view. Another reason is that no other body of precedent has been found for applying the terms "fair, reasonable and not unjustly discriminatory" in the grant agreements.

Use of the Federal Statutes and case law as the test for interpreting Assurance No. 20 is also reasonable. As pointed out in the November 3, 1987 Order (p. 10, fn. 6), if the test for Assurance No. 20 were different from that under the Federal Statutes and case law the Administrator would have *carte blanche* to override the effect of the Federal Statutes and case laws by different interpretations of the grant agreements. Reciprocally, airport proprietors would be able to claim the right to take actions under the grant agreements which were barred under the statutes and case law. No one has cited any evidence that FAA intended to rely on the grant agreements to justify restrictions on SFIA that it could not otherwise impose. Nor has anyone shown what the Commission intended by en-

tering the grant agreements, to surrender any rights it was entitled to exercise.

A reasonable argument can also be made that the technique used here is consistent with a ruling by Judge Irving Hill of the U.S. District Court for the Southern District of California *In Santa Monica Airport Association v. the City of Santa Monica*, 481 F. Supp. 927 (1979) at 946. There Judge Hill rejected a claim by the plaintiff aircraft owners that the grant agreement and the Federal Aviation Act obligations are broader or different than the constitutional issues.

The only opposition to this scheme of relying upon the Federal Statute and case law to define what is fair and reasonable and not unjustly discriminatory under Assurance No. 20 comes from Burlington. That party now argues on brief that by accepting federal airport funds, the Commission contracted away any "legislative right" it might have to make classifications which amount to discrimination. Burlington cites no authority for this position and it is rejected. There is no basis for concluding that when it entered the grant agreements the Commission somehow surrendered any right the courts have recognized that they possess as proprietors of the airport to promulgate regulations establishing the requirements as to the permissible level of noise which can be created by aircraft using the airport.

It is concluded, therefore, that any discrimination which the Commission is prohibited by the Federal Statute and case law from practicing is likewise prohibited by Assurance No. 20 of the grant agreements. Similarly, any discrimination which the Federal Statutes and case law permits is permitted by Assurance No. 20.

V. The Concord Cases

The Commission's action barring the Q707 from SFIA while other noisier aircraft are admitted exceeds the air-

port's authority to control the permissible levels of noise in the vicinity of the airport. In *British Airways v. The Port Authority of New York, et al.*, 564 F.2d 1002 (2d Cir. 1977) and 558 F.2d 75 (1977), the court held that the failure of the Port Authority of New York and New Jersey for 13 months to accord landing rights to the supersonic Concorde despite the fact that the Concorde met the noise standards consistently applied to other aircraft frustrates the scheme adopted by the Congress for regulating noise and unconstitutionally burdened interstate commerce. The Second Circuit found that exclusion of the Concorde under those circumstances exceeded the Airport's recognized power to prescribe the permissible level of noise by aircraft using the airport because such power is confined to the issuance of reasonable, nonarbitrary and nondiscriminatory rules. The court in the *Concorde* cases affirmed the power of the Port Authority to adopt noise standards but emphasized and insisted that all such standards had to be uniform and reasonable.

The record in the instant cases places the Commission's action squarely in the area prohibited to airport proprietors by the *Concorde* cases. The Commission has consistently excluded the Q707 despite the fact that it meets the noise standard which the airport has consistently applied to 15 other models of aircraft which it permits to operate into the airport including 6 models which have actually operated. The primary basis upon which the Commission has undertaken to exclude the Q707; namely, that it is significantly louder in the takeoff mode than any other aircraft permitted to operate at the airport since January 1, 1985, has been shown by the record of this case to be wrong. The treatment which has been and is being accorded the Q707 by the Commission is therefore neither uniform nor reasonable within the standards of the *Concorde* cases. If the Commission's action were to be evaluated on the standards applied in those cases, it would be an unconstitutional burden on interstate commerce. It is

therefore found to be unfair and unreasonable and unjustly discriminatory under Assurance No. 20 of the grant agreements.

VI. The "Rational Belief" Defense

In a pretrial brief filed on April 27, 1988, and in its post-hearing brief, the Commission abandons its argument that the Q707 is noisier than the FAA contends and that it is noisier than any other aircraft operating at the airport. Instead, the Commission makes an extensive argument based on a footnote in the case of *Santa Monica Airport Association v. City of Santa Monica*, 659 F.2d 100 (9 Cir. 1988) at 104. In substance, the Commission's argument is that even though the basic assumption upon which it relied for excluding the Q707; namely, that it was noisier than any other aircraft permitted to operate at the airport was wrong, so long as the Commission had a *rational belief* that it was noisier and that excluding it would reduce the possibility of liability and enhance the quality of the environment it was justified in excluding the aircraft. This argument relies upon the further contention that the Commission was wrong about the Q707 only because Burlington and the FAA failed to give it any full power takeoff noise information on the aircraft before the Commission's decision on April 15, 1986, to exclude it.

"Rational belief" is not the proper test for evaluating the Commission's actions. The footnote in the *Santa Monica* case reads as follows:

> Plaintiffs also argue that even if *Griggs* is used to justify a municipal-proprietor exemption to preemption, that exception should be limited to ordinances necessary to avoid *Griggs* liability. The problem with this argument is that it assumes that *Griggs* liability is limited to Fifth Amendment takings. Nothing in *Griggs* indicates such a limitation. Liability may well be imposed upon a municipality on theories other than inverse condemnation. The City of Santa Monica

> should be allowed to define the threshold of its liability, and to enact noise ordinances under the municipal-proprietor exemption if it has a *rational belief* that the ordinance will reduce the possibility of liability or enhance the quality of the city's human environment, 659 F.2d 104 (emphasis added.)

The Commission reads far too much into the phase "rational belief" in the last sentence of this footnote. As seen, the court was dealing with an argument by the appellant aircraft operators that since the authority of the airport operators to regulate noise levels at the airport is based on the case of *Griggs v. Allegheny County*, 369 U.S. 84, and since *Griggs* liability is limited to Fifth Amendment takings, the local airport's noise authority should be limited to ordinances necessary to avoid Fifth Amendment takings. The court said that nothing in *Griggs* indicates such a limitation and that liability may well be imposed upon the municipality on theories other than Fifth Amendment takings. It was in the course of explaining this fact that the court said that the Santa Monica Airport should be allowed to define the threshold of its liability and to enact noise ordinances under the municipal-proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability, or enhance the quality of the city's human environment. The footnote was directed at rejecting a specific limitation advanced by the aircraft operators on the airport's authority to regulate noise. The court merely used the phrase "rational belief" in passing. From the context, it is clear that the court's use of the phrase had nothing to do with questions of legislative error, or reasonable mistake as the Commission contends.[9]

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[9] The reference to "rational relief" by the undersigned in the November 3, 1987 Order (p. 10) was intended to give that term the same meaning as the court did and not to incorporate any new legal doctrine of legislative error or reasonable mistake.

VII. The Correct Test

The more precise and common formulation of the test for airport action and the one which is adopted here is that the method of classification used by the Commission to exclude the Q707 must have a "rational relationship" to a legitimate goal of regulation by the Commission as proprietor of the airport.[10] As declared in the footnote of the *Santa Monica* case, the legitimate goals of local noise regulations are the reduction of the possibility of liability and/or enhancement of the quality of the human environment. It is not enough that the Commission may have had a "rational belief" that the classification at issue would achieve these valid purposes. It is necessary that the classification, in fact, achieve these purposes. In short, the correct test is objective. It is not subjective as the Commission contends.

The record in this case now shows conclusively that the method of classification used by the Commission, namely, the exclusion of the Q707 because it was not a class of aircraft which had been certificated as Stage 2-compliant and operated at SFIA before January 1, 1985, is not rationally related to either of the two permissible goals of local noise regulation. As seen below, it does not achieve either of those two goals.

In regard to the first test, excluding only the Q707 is not rationally related to reduction of the possibility of the Commission's noise liability. The Commission's action permits 15 models of other aircraft as noisy or noisier than the Q707 to continue to operate. It also permits carriers to expand the operation of these aircraft at SFIA at will. The Commission has presented no evidence to show that excluding only the Q707 under these circumstances will

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[10] If it does not have such a rational relationship, it is a denial of equal protection under the Constitution. *Santa Monica Airport Assn. v. City of Santa Monica*. 431 F. Supp. 927 (1979) at 944.

reduce the possibility of the Commission's liability for noise to neighboring landowners. The only way this could be shown would be to demonstrate that the landowners would be likely to recover some greater amount in a noise suit which named the Q707 along with 15 noisier aircraft than they could recover in a suite which named only the 15 noisier aircraft. Nothing in this record gives any reason to believe that this could be done. Moreover, there has been no argument, nor could there be, that a noise suit against the airport naming only the Q707, while 15 noisier aircraft are allowed to operate, would be successful.

It is equally clear that banning the Q707 will not meet the second test in the *Santa Monica* case of improving the environment around SFIA. Leaving 15 noisier models of aircraft flying and with the right of operators to add additional aircraft of each of those models at will, while banning only the Q707, will not constitute any measurable improvement of the environment around this airport. It is true as the Commission contends that authorizing Burlington to operate the Q707 into SFIA could encourage the retrofitting of additional Q707s by Burlington and other operators who would then be free to operate them into the airport. However, there is no evidence to show that the number of Q707s which would be introduced into SFIA would approach the number of the 15 models of additional noisier aircraft which have been and in the future may be introduced into the airport under the Commission's regulations.

There is precedent for the foregoing determination in the decision of Chief Judge Irving Hill of the U.S. District Court for the Central District of California in the *Santa Monica* case, 481 F Supp. 927 (1979) at 944. Judge Hill found that the airport's adoption of a categorical ban on jet aircraft at city owned and operated airports while propeller aircraft were permitted to operate violated the equal protection clause of the U.S. Constitution and imposed an impermissible burden on interstate commerce. The Santa

Monica Airport had banned jets and permitted propeller aircraft to remain on grounds that the jets made a shriller and less acceptable noise and that jet aircraft operations were not as safe as propeller aircraft operations. The record in that case showed that the jet noise was no different from the propeller aircraft noise and that the propeller aircraft was no safer than the jet. Judge Hill found, therefore, that the distinctions which the airport made were not rationally related or reasonably adapted to the legitimate purposes of airport regulations which he found were a quieter environment and airport safety.

Exclusion of the Q707 from SFIA on noise grounds while other noisier aircraft are admitted would similarly violate the equal protection clause and would be an impermissible burden on commerce if that action were to be measured under those standards.

VIII. The "Legislative Mistake" Defense

In support of its "rational belief" test, the Commission cites *Minnesota v. Clover Leaf Creamery Company*, 449 U.S. at 464. In that case, the court was examining a Minnesota statute which banned the sale of plastic milk containers but permitted the continued sale of paperboard milk containers. Against the argument that the paperboard milk containers were not environmentally superior to plastic and that the discrimination against the plastic was not, therefore, rationally related to the legislature's objective of encouraging the use of environmentally superior containers, the U.S. Supreme Court said:

> Whether, in fact, [Minnesota] act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota legislature could rationally have decided that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives.

From this case the Commission argues that it is not enough for FAA and Burlington to show that the Commission was mistaken when it believed it was promoting noise abatement and curbing its liability for potential noise related damages. The Commission contends that they must also show that the Commission could not reasonably have believed that those goals might be fostered by its regulations.

This Tribunal and the Administrator of FAA in interpreting the provisions of a grant agreement owes no such deference to the mistaken findings of the San Francisco Airports Commission. To begin with, there is nothing in the language of the Circuit Court in the *Santa Monica* case to suggest that in using the term "rational belief" in the footnote it was addressing the issue of legislative mistake dealt with in the *Minnesota* case. The *Minnesota* case also is distinguishable on other grounds. It involved a discrimination by an elected State Legislature. In *Delaware River Basin Commission v. Bucks County Water and Sewer Authority*, 641 F.2d 1087, 1092 n.11 (3rd Cir. 1981), the Court of Appeals explored whether the deference paid by the courts to legislatures in refusing to correct their unwise policy decisions should be extended to the actions of administrative bodies. It said that generally absent from administrative decisionmaking is the safeguard of correction of unwise policy choices by the democratic process (at the polls), the safeguard cited by the Supreme Court in *Vance v. Bradley*, 440 U.S. at 97, 99 S.Ct at 943, as underpinning rational basis analysis. It is concluded here that even if the Commission had a "rational belief" that its method of discrimination would achieve a valid regulatory purpose (which belief as indicated below it did not have) this would not have been enough to protect this regulatory commission from the charge that its action denied equal protection to the operator of the Q707.[11]

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[11] Moreover, whatever defense the rational belief might have provided the Commission when it acted between October 17, 1985 and on April 15, 1986, was lost when the Commission learned the true facts.

IX. The "Ratchet Down" Defense

The Commission relies on *Williamson v. Lee Optical Company*, 348 U.S. 483, 489 (1955), for its position that its selection of the Q707 for inclusion while permitting 15 models of noisier aircraft to continue to operate is a reasonable "ratchet down" system. In *Williamson* the Oklahoma Legislature barred opticians from fitting lenses to a face without a prescription from a medical specialist but exempted all sellers of ready-to-wear glasses. The court said there was no denial of equal protection because a legislature may proceed "one step at a time" and it may "select one phase of one field and apply a remedy there, neglecting the others."

This argument has been expressly rejected in the most relevant airport noise case in which it was argued. In the *Santa Monica* case, 481 F.Supp. at 944, as indicated above, the airport had imposed a categorical ban on all operations by jet aircraft while exempting propeller aircraft. Judge Hill was presented with an argument by the city that within its permissible area of regulation it could decide even arbitrarily whom to let in and whom to exclude. He said that the city in making this argument relied on some general language from the cases that in exercising the police power a city does not have to exercise its maximum authority and does not have to solve every evil. He said that while that black letter proposition was, of course, valid it was inapplicable to the situation at the Santa Monica Airport. He said that as long as the city prescribed a specific level of permissible noise no discrimination between jet and prop planes was permitted under the Equal Protection Clause.

"Ratchet down" is equally invalid as a defense here. As at Santa Monica, the Commission does not have the right arbitrarily to choose whom it will let in and whom it will exclude.

Contrary to the Commission's position, there is no significant parallel between its system of excluding the Q707 on the basis of its date of certification and FAA's Congressionally-authorized method (FAR-36) of imposing tighter noise standards on aircraft based on the date that the application for a type certificate is filed.

X. The "Grandfather" Defense

The Commission defends its ban of the Q707 on grounds that it is a valid grandfather clause of the type which the courts have found do not violate the Equal Protection Clause. It relies on *New Orleans v. Dukes*, 427 U.S. 297 (1976), in which the court upheld against a claim of unjust discrimination an ordinance banning push cart vendors from operating in the French Quarter and exempting from the ban vendors who had operated there more than eight years. The cases are distinguishable.

The grandfather clause in the *New Orleans* case limited the grandfathered class to certain existing push cart vendors. In the present case any number of operators of aircraft models which are noisier than the Q707 may introduce any number of such aircraft into the airport at will.[12]

XI. Absence of "Rational Belief"

Assuming *arguendo* that "rational belief" were a valid basis for the Commission's action, the record in this proceeding shows that if the Commission believed that its exclusion of the Q707 while admitting other noisier aircraft was reasonably related to reducing the possibility of noise related liability or of enhancing the quality of the environment such belief was not rational.

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[12] The provision validated in *Western Airlines v. Port Authority*, 658 F.Supp. 952 (S.D.N.Y. 1986) Aff'd. 817 F.2d 222 (2d Cir. 1987), grandfathering flights from La Guardia to Denver as an exception to the 1,500 mile perimeter rule was limited to Denver and was not an open-ended provision permitting the grandfathered class to be enlarged at will as in this case.

In essence, the Commission's rational belief argument, which consumes 29 pages of its brief, is based on its contention that no one would tell them until late in this proceeding that the noise level of the Q707 at its maximum takeoff weight was 107.8dB or give them the data necessary to verify that number. The Commission complains that never in the course of the Commission's processes which culminated in the April 15, 1986 denial of the SAT/Burlington waiver application did the FAA, Burlington, or Southern Air Transport provide the Commission with any full power takeoff noise data on the Boeing Q707. The Commission claims that Burlington made a number of written and oral submissions to the Commission or its staff in the period prior to the March 18, 1986 public hearing. It said that the FAA also made a number of written submissions to the Commission or its staff prior to the public hearing. It contends that while Burlington made an extensive oral submission at the public hearing, the FAA made none. Yet, it asserts, neither Burlington nor the FAA chose in any of their submissions to provide full power takeoff noise data on the Boeing 707.

The Commission contends that the failure to provide this information was the outgrowth of Burlington and the FAA's position at the time that the Commission was legally obligated to accept all Stage 2 aircraft and the further fact that the noise data was deemed (and continues to be deemed), highly sensitive, proprietary information which Shannon/Tracor did not wish to disclose. The Commission contends that it was not until December 1987 during the discovery phase of this proceeding that Burlington first provided the Commission with what Burlington contended was the full power takeoff noise level of the Boeing Q707 at its maximum certificated weight of 322,300 pounds. The Commission contends that the first time FAA provided its figure for the full power takeoff noise level of the Q707 at its maximum takeoff weight was January 26, 1988. Even on these dates, however, the Commission

contends that neither Burlington nor the FAA provided the Commission with the data underlying their numbers. It says that it was only in the five weeks (beginning on March 25, 1988) immediately prior to the May 1988 hearing in this case that Commission Counsel, through court ordered discovery and subject to a strict protective order, was able to secure the data which Burlington and FAA relied upon to support their full power takeoff noise levels at maximum takeoff weight. The Commission complains that by reason of the protective order no Airport Commissioner and no employee of the Airports Commission has even today seen the noise data relied upon by Burlington and the FAA.

The Commission contends that based on the record when it denied the SAT/Burlington waiver request on April 15, 1986, the Commission reasonably concluded that granting the requested waiver was not in the public interest, that permitting the Boeing Q707 to operate would require the Commission to accept other retrofitted Boeing 707 operations, that these retrofitted Boeing 707 operations would increase the noise impact of airport operations, and that the Boeing Q707 without the use of thrust cutback and at full certificated weight would be noisier than other aircraft then permitted to operate at SFIA. The Commission contends that it therefore reasonably concluded that its April 15, 1986 waiver denial would promote improvement in the noise environment at SFIA and would serve to limit its noise damage liability.

The key above finding by the Commission is, of course, the takeoff noise level of the Q707 and its relation to other aircraft. As set out in detail above, the Commission was wrong in its assumption on April 15, 1986 that the Q707 at full power would be noisier on takeoff than any other aircraft permitted to operate at SFIA.

If there were such a test as "rational belief," the test would be whether the Commission had a rational belief

that its action excluding the Q707 while admitting other noisier aircraft was "rationally related" to the airport proprietor's authorized regulatory purposes of liability reduction and enhancement of the environment. To meet such a test, the Commission would have to show that it was rational for it to believe that the Federal Aviation Administration, the agency established by Congress and charged with the responsibility for setting national noise standards and measuring the noise of individual aircraft to determine compliance with those standards had made a serious mistake with regard to the noise level of the Q707 and the 15 other aircraft which FAA's data showed to be noisier. The Commission has not shown on this record that such a belief was rational.

The most that the Commission can show is that it was not provided until late in this proceeding with the information which it considered necessary to convince itself that the FAA's noise data on the Q707 and the other 15 aircraft was correct. The most that it can show, therefore, is that its information was incomplete. It is concluded here that the Commission's incomplete information would not support a "rational belief" that the federally- designated agency had made a major error in the performance of one of its primary functions, the noise certification of U.S. aircraft.

The Commission was clearly confronted with severe restrictions on its access to the information underlying the noise certification of the Q707 at full power and maximum takeoff weight during the period when it was deciding to exclude the airplane. The restrictions do not justify the Commission's action. The opposition by the other parties to disclosure of the data was based on valid proprietary grounds. There was testimony that access to some of this proprietary data could greatly shorten the time for another manufacturer to build a competing hush kit. Burlington, Shannon/Tracor, Boeing and FAA were therefore fully within their rights in insisting on a strong protective order

before making the underlying certification data available to the Commission's experts and Counsel.[13] [14]

It was not rational for the Commission to give as little credence as it did to the data and processes of the Federal Aviation Administration. While it may properly have insisted on the data necessary to make a meaningful comparison between full power noise of the Q707 and that of other aircraft, it was not entitled to act to exclude the Q707 while it lacked the information for such a comparison. The FAA repeatedly advised the Commission before

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[13] The testimony by Burlington's witness that he had been willing to provide the underlying certification date in JS-1146 to the Commission on various occasions in 1985 and 1986 is unpersuasive. It is inconsistent with the position in the brief of Southern Air Transport, Burlington's lessor, that the Commission should never have been allowed to probe as far as it did into the FAA's certification of the Q707. In view of this position, Southern (as Burlington's lessor) could be expected to have resisted any effort by Burlington to provide the underlying JS-1146 data to the Commission in 1985 and 1986.

[14] Whether the parties could or should have reached agreement earlier on a protective order to provide the Commission the noise data that it considered necessary to confirm FAA's findings is a moot question now. The fact is that all of the parties, including the Commission, assumed an adversary litigative posture as soon as it began to appear that the Commission intended to bar the aircraft and that the FAA was planning to retaliate by withholding grant funds and suspending new grants. There was little inclination early in this controversy for any party, including the Commission to voluntarily surrender any data that might jeopardize its success in the administrative and judicial proceedings they obviously expected would follow. Until discovery was ordered the Commission did not disclose all of the bases for its conclusions or everything that its experts told it. Nor did it pursue various offers by Burlington to elaborate on the limited data which Burlington had provided. At the early stages of these proceedings FAA volunteered nothing of consequence other than publicly available data. Burlington's expert furnished nothing of significance on the Q707 at full power and maximum takeoff weight until required to do so in this proceeding. No party therefore bears any greater responsibility than the others for the Commission's lack of information on the true noise level of the Q707 at full power and maximum takeoff weight in 1985 and 1986.

it excluded the Q707 on April 15, 1986, and while the Commission was dealing with Burlington's petitions for reconsideration about the noise levels of the aircraft involved. The record here shows that the Commission essentially disregarded FAA's assurances as to the noise levels of the Q707 and that it was quieter than 15 other aircraft permitted to operate. Instead, it elected to act on the basis of its own noise evaluations. When Mr. Turpen, Director of the Airport, was advised by Mr. James E. Wesler, FAA's Director of Environment and Energy, of FAA's determination of the full power takeoff noise level of the Q707, he "did not accept it on the face value as an objective document from a federal agency" (Tr. 943). He described it later as "just another piece of data" (Tr. 1057). Mr. Turpen elsewhere declared that the FAA as a source of noise certification data was not considered by him to be "any more or less reliable than any other information I was getting" (Tr. 1058). FAA's data and advice was rationally entitled to greater credence than that.

The fact that the Commission (and others) were misled by the 2.4dB error in the 1974 Boeing/FAA study does not excuse the Commission's disregard of FAA's advice. The Commission chose to rely on such secondary sources rather than assurances from the Federally constituted agency. Its belief that such sources were entitled to greater credence than FAA's data and advice was not rational.

XII. The Commission's 1988 Resolution

On January 22, 1988, the Commission adopted Resolution 88-0016 (Turpen Ex. 1). The new resolution repealed the 1978 resolution which lead to the foregoing actions by the Commission and all of the airport operations bulletins issued thereunder. Accordingly, the Commission asserts that the only current regulatory basis for exclusion of the Q707 by the Commission is the 1988 resolution itself. Section 4(a) of that resolution is relied upon by the Commis-

sion as the basis for the continued exclusion of the Q707. It reads as follows:

> (a) *Stage 3 Requirement for Aircraft Types not in Operations on or before January 1, 1985.*
>
> Upon the effective date of this regulation, an aircraft will be permitted to commence or continue operation at SFIA only if it is a Stage 3 aircraft or a Stage 2 aircraft or a type of Stage 2 aircraft operating at SFIA on or before January 1, 1985.

As seen, the new resolution carries forward the January 1, 1985 date of retrofit for Stage 2 aircraft as the basis for excluding the Q707. It continues, without any change, the bar on operations by the quieter Q707 while noisier aircraft are permitted to "commence or continue" operations. The Commission has made clear in its statement of purpose and need for the 1988 resolution (Turpen, Ex. 1, p. 24) that section 4(a) of the 1988 resolution:

> "is fully consistent with (and a continuation of) the Commission's [1978 regulation] and the actual practice under that regulation and, accordingly, is reasonable."

The 1988 resolution carries forward from January 22, 1988, the discrimination against the Q707 contained in the Commission's actions in 1985 and 1986 excluding that aircraft from the airport. Notwithstanding the repeal of the 1978 resolution upon which those actions were based, the new resolution, insofar as the Q707 is concerned, relies for its effect upon precisely the same discriminatory method of classification which has been found above to be in violation of the grant agreements. Thus, under the new rule, the Q707 continues to be excluded from the airport because it was not of a type which was Stage 2-certificated and operating at SFIA on or before January 1, 1985. The Commission has shown no difference in this respect be-

tween its previous actions and section 4(a) of the new resolution. All of the same discriminations are retained. The Q707 which is quieter than 15 other types of aircraft is prohibited from commencing service under the new rule while the other 15 are permitted to continue to operate into the indefinite future.

The reference in the Commission's explanatory statement of the reason for its adoption of the January 1, 1985, cutoff date highlights the discriminatory aspect of the rule. Thus, the Commission states, "The January 1, 1985, date was selected as the cutoff date for admitting new Stage 2 aircraft types, in part, because since that date no new Stage 2 aircraft types have been permitted to operate at SFIA." This makes clear that in adopting the new resolution, the Commission was relying in part upon its exclusion of the same aircraft on the basis of the old resolution which as seen above is unlawfully discriminatory. The new resolution therefore violates the grant agreement both of itself and because of its reliance upon the old resolution. The new resolution is therefore no less discriminatory than the old one, and its adoption and continued application by the Commission violate the continuing requirement in Assurance No. 20 that the airport be available for the use and benefit of the public on fair and reasonable terms and without unjust discrimination.

It is also correct as FAA Counsel contends that the exclusion by the Commission of the Q707 while admitting the 15 other models of noisier [sic] aircraft has an additional discriminatory effect against the Q707 in that each of these aircraft may continue to operate or commence operations until certain periods in the future whereas the Q707 is barred forever. The extent of the discrimination by the new resolution against the Q707 in favor of the other 15 aircraft models varies under sections (4)(B)(1) through (4)(D) of the resolution. Under section 4(B)(1) these other aircraft need not cease operating until as late as 1999 depending upon the percentages of permissible Stage

2 operations by a carrier's fleet which the Commission prescribes in a determination to be made by January 1, 1992. Under section 4(B)(2) these other aircraft, even if barred for other reasons, may operate in international service under certain conditions after 1999 while the Q707 is forever banned. Under section 4(C) of the new resolution, the other Stage 2 aircraft are not banned from nighttime operations in certain circumstances until January 1, 1993, while the Q707 is permanently banned. Under section 4(D) of Resolution 88-0016, the other aircraft are banned from operating after January 1, 1993 if their certificated sideline noise exceeds 103EPNdB. The Q707 is permanently banned and may not operate before or after 1993 despite the fact that its sideline noise is 99.3EPNdB at 322,300 pounds takeoff weight (Densmore FAA-T-1, App. 4). The extensive consideration which the Commission admittedly gave to the matter before adopting the 1988 resolution does not mitigate the unlawful discrimination which the new resolution exerts against Burlington's Q707s.

The Commission contends that Burlington cannot properly object to the 1988 resolution because Burlington has made the tactical decision not to file a variance application under the resolution as required by the terms thereof. It is concluded here that the fact that Burlington has not filed an application for a variance from the 1988 resolution does not prevent this Tribunal from finding the 1988 resolution to be a violation of the grant agreement. Despite its contentions that a new application will be considered afresh nothing that the Commission has said or done in this proceeding gives any reason for Burlington or this Tribunal to conclude that there is any possibility that an application by Burlington for a variance would have been granted by the Commission. As Burlington has pointed out, the courts have held that there is a limit upon the extent to which a litigant must exhaust his administrative remedies. The nearly three years of litigation by Burlington to gain admission to the airport are enough.

XIII. SAT's Objection to Scope of the Challenge Permitted

Southern Air Transport, Inc., which was granted limited permission to intervene in this proceeding has filed a brief objecting strongly to the extent to which the Commission was permitted by this Tribunal to inquire into the certification basis of the Q707. SAT contends that under the relevant statutes and the existing case law, neither this Tribunal nor any airport proprietor may go behind FAA certification data and approvals to attack the noise characteristics of a particular aircraft type. SAT contends that the Federal Aviation Act of 1958, as amended, is designed to protect airline operators and manufacturers such as Shannon/Tracor, supplier of the hush kit, from such unwarranted and illegal attacks upon FAA product certification decisions. SAT expresses concern that the Commission was permitted to subpoena the hush kit supplier to produce highly proprietary and confidential Q707 noise certification data. SAT contends that if such a procedure is not renounced, it will represent a serious blow to the statutory scheme of FAA certification and review.

SAT's objections are without merit. The same objections were vigorously presented earlier by various full parties to this proceeding and rejected. SAT has shown no harm to its interests or the proprietary interests of Shannon/Tracor which supplied the hush kits. A very tight protective order was negotiated between the parties and imposed by the undersigned. The order limited access to sensitive proprietary data to Counsel and those outside experts needed to develop a full record. The Commission members themselves are still barred from seeing the data. So far as this record shows the protective order has been effective. There is no contention by Shannon, Boeing or anyone else, including SAT, that data submitted to anyone who swore adherence to the protective order has been divulged or is likely to be.

The discovery permitted in this case has been demonstrated to have been essential to the resolution of the difficult issues which the case presented. Nearly two and one-half years after the exclusion of the aircraft and over a year after this proceeding began, the parties were at an impasse—unwilling or unable to exchange or stipulate anything significant as to the noise levels of the Q707 or any other aircraft. Legitimate proprietary rights were face-to-face with the Commission's legitimate interests. This Tribunal was unprepared to resolve the case on the record which existed before the discovery began. In order to grant the Commission the full hearing on the facts to which it was entitled under FAA's procedural rules, it was necessary to allow the Commission to mount the challenge that it did.

It is unlikely that this case will serve as a precedent for similar action by any other airport proprietor in the future. The magnitude, sophistication and probably the expense of the San Francisco Airports Commission's attack on FAA's noise certification processes and data, and the failure of that attack to demonstrate any deficiency in FAA's processes or data should discourage similar attempts by lesser airport proprietors.

XIV. Remedy

It is concluded here that the remedy for the Commission's violation of Assurance No. 20 of the grant agreements entered into under the Airport and Airway Development Act of 1970 is to confirm that the Federal Aviation Administration may continue to withhold any funding now being withheld under such grant agreements.

The Commission contends that any breach of Assurance No. 20 of grant agreements entered into under the Airport and Airway Development Act of 1970 which may have occurred by reason of the Commission's actions between October 1975 and April 1986 has been cured by the Commission's action of January 22, 1988 repealing the 1978

noise abatement resolution and the Airport Operations Bulletins adopted thereunder. As a result, it contends that the Commission's 1985/1986 waiver process is having no current effect on Burlington's proposed operations and that the carrier's present inability to operate is due solely to its failure to apply for a waiver under the new 1988 resolution. In substance, it argues that if there was any default, it was cured by the 1988 resolution.

The Commission argues that there is no provision under any of the 1970 ADAP grant agreements by which to rectify a past breach. It further contends that FAA has declared that it intends to give grantees 60 to 90 days in which to cure defaults under the agreements. The Commission states that if it should be found in default it would, of course, conform its conduct to applicable legal requirements and that there is no need, therefore, to consider what contractual remedies the Commission and FAA have agreed upon in the event of a breach of the ADAP grants. Finally, the Commission contends that FAA must demonstrate that any remedy which it proposes is one which the Commission knowingly accepted when it entered into the 1970 ADAP grants.

In regard to the appropriate remedy, FAA Counsel disputes the judge's earlier ruling (Order of August 13, 1987) that this proceeding and the remedies available thereunder are limited to violations of the grant agreements entered into under the Airport and Airway Development Act of 1970. FAA Counsel argues that the remedies in this proceeding also extend to violations of grant agreements entered into under the Airport and Airway Development Act of 1982. In support of this argument FAA Counsel asserts that FAA's suspension of the issuance of any new grants since July 7, 1986, when this proceeding began, has been based on section 509(b)(1)(E) and 511(a)(1) of the 1982 Act. It asserts that those provisions require the FAA to assure compliance with grant agreements. FAA Counsel advances no argument not considered and rejected earlier for ex-

tending the jurisdiction of this Tribunal to anything which occurred under the 1982 Act or the grant agreements entered into thereunder. As pointed out by the Judge on a number of previous occasions FAA's procedural rules (14 CFR 13.20) omit any mention of the 1982 Act. The violations found and remedies ordered here will be limited therefore to violations of the grant agreements under the 1970 Act and will not extend to the 1982 Act.

Even though the Airport and Airway Development Act of 1970 has been repealed, and all but a small amount of the funding due under its grant agreements has been paid,[15] the obligations assumed by the Commission under Assurance No. 20 of the grant agreements remain in effect. The Commission conceded on the record that those obligations continue for as long as the equipment that was provided under the grants stays in use (Rosenthal Tr. 62) or in the case of the funding for runways, taxiways, land acquisition, etc., the obligations extend for 20 years or longer (Rosenthal Tr. 63). The obligations under Assurance No. 20 of grant agreements entered into under 1970 Act were therefore in existence during the entire period that the Commission excluded the Q707 under its 1978 Resolution and such obligations violations continue in effect up to the present time. Since such funding is already being withheld, there is no basis for any 60- or 90-day extension of time for implementing the decision herein as the Commission proposes. Moreover, the withholding of funds for violations is a remedy clearly contemplated by the FAA and the

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[15] The amount of money remaining unpaid under 1970 ADAP grant agreements is very small. At the hearing in May 1988 there was testimony that the unpaid amount as of September 30, 1987, was only $183,505. This amount remained from grant agreement 1079 entered into on November 13, 1979 (FAA-T-7, SFO-T-6). An additional withholding of $300,000 shown on that exhibit as unpaid is actually money owed *by the Commission* to FAA for work performed but not yet billed. There is nothing there that can be withheld by FAA as a remedy for any violation found in this proceeding.

Commission for violations of the grant agreements. The authority of the FAA to continue to withhold any funding under the 1970 ADAP is confirmed.

While the obligations and the violations under the 1970 Act's grant agreements are found to continue in effect, inasmuch as the 1982 Act and its grant agreements are not before the undersigned, no determination is made here whether the authority to continue the current temporary suspension of approximately $25 million under the 1982 Act and its grant agreements should be affirmed.[16]

ACCORDINGLY IT IS ORDERED:

1. That the exclusion by the San Francisco Airports Commission of the Q707 aircraft of Burlington Air Express from San Francisco International Airport is a violation of Assurance No. 20 of the grant agreements entered into between the San Francisco parties and FAA under the Airport and Airway Development Act of 1970 in that it thereby failed to operate the airport for the use and benefit of the public on fair and reasonable terms and without unjust discrimination.

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[16] Evidence was received (Neff BAX-T-1 and BAX-PH-201 through 204, Rev.) and contested (Murphy SFO-T-5) on the matter of whether the impact of the discrimination on Burlington forcing it to use the Oakland Airport was such as to compel a change in the fleet composition of the carrier. In *Global International Airways Corp. v. Port Authority of New York and New Jersey*, 727 F.2d 246 (2d Cir.) reh'g. denied, 731 F.2d 127 (1984) the Second Circuit approved a local regulation barring Stage 1 aircraft in advance of the termination date fixed by FAA. The court indicated that had the rule, as an economic matter compelled a change in the carrier's fleet composition, the rule would have exceeded the airport proprietor's authority to regulate noise at the airport and would have invaded the area of aircraft navigation preempted by the Federal Government. It was unnecessary to address that matter in order to resolve the issues in this case and no reliance has been placed on the thorough and extensive evidence in the record dealing with this subject.

2. That the continued exclusion of the Q707 aircraft from the airport under the January 22, 1988 resolution of the San Francisco Airports Commission also violates Assurance No. 20 of the said grant agreements for the same reasons.

3. That the actions of the Federal Aviation Administration withholding grant funds for failure to comply with Assurance No. 20 of the grant agreements entered into under the Airport and Airway Development Act of 1970 are affirmed.

4. That the motions of the parties to correct the transcript of the hearing are granted.

5. That all motions and requests herein, to the extent not granted, are denied.

/s/ William A. Kane, Jr.
William A. Kane, Jr.
Chief Administrative Law Judge

[Service List Omitted In This Printing]

APPENDIX E

U.S. Department of Transportation Office of the Administrator 800 Independence Ave., S.W. Washington, D.C. 20591

Federal Aviation Administration

Mr. Louis A. Turpen
Director of Airports
San Francisco International Airport
San Francisco, California 94128

Re: December 31, 1987 Application for Approval of Grants under the Airport and Airway Improvement Act of 1982

Dear Mr. Turpen:

This letter advises you, on the date required by order of the court in *City and County of San Francisco v. Burnley*, No. 88-7320 (9th Cir., September 21, 1988), that I have denied the application of the City and County of San Francisco, filed with the Federal Aviation Administration on December 31, 1987, for federal airport assistance grants to the San Francisco International Airport ("SFIA") under the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2201 *et seq.* This denial is necessitated by and results from the decision issued today in *In re San Francisco Airports Commission*, FAA Docket No. 13-86-2.

Although you characterized the December 31 Application as new, it merely incorporated the aggregate of projects and money requests included in earlier applications that had not yet been acted on by December 31, 1987—specifically, SFIA's applications of December 6, 1985, May 28, 1986, and May 1, 1987. Of the funds covered by the December 31 Application, $8,564,805 consisted of allocations under section 507 of the 1982 Act, 49 U.S.C. § 2206(a)(1), for fiscal year 1986. *See* Supplemental Declaration of Lowell H. Johnson in *San Francisco v. Burnley*, (Johnson Supplemental Declaration") at 3-5 (August 29, 1988). Under

section 508(a) of the 1982 Act, 49 U.S.C. § 2207(a), entitlement funds apportioned to the City and County in any one fiscal year are reserved for the City and County's use for that fiscal year and the two following fiscal years. At the end of this period, any funds not obligated to the City and County are added to the FAA's fund for discretionary grants established by section 507(a)(3) of the 1982 Act, 49 U.S.C. § 2206(a)(3).

When the City and County filed its December 31 Application, the San Francisco Airports Commission, which operates SFIA, was a party to an administrative hearing (Docket 13-86-2) in which FAA Counsel alleged that the Commission's exclusion of a Burlington Express retrofitted Stage 2 Q707 aircraft from SFIA was unfair, unreasonable and unjustly discriminatory in violation of grant assurances the City and County had given to the FAA. The FAA had temporarily suspended approval of grant applications pending the completion of its proceeding. Because of this ongoing suspension of all new grants to the City and County, no action was taken on the December 31 Application.

As noted, I have today issued a decision in *In re San Francisco Airports Commission*, which finds that by excluding the Q707 the City and County of San Francisco has violated the assurances in the grant agreements it previously entered with the FAA, by which it agreed to operate SFIA for the use and benefit of the public on fair and reasonable terms and without unjust discrimination. In view of this Decision, I have affirmed and finalized the temporary suspension of approvals of the City and County's grant applications. In addition, I have directed that no further applications for grant funds under the 1982 Act for SFIA be approved until the City and County complies with these grant obligations.

Accordingly, the City and County's December 31 Application is denied. My decision here follows from my decision in Docket 13-86-2. The December 31 Application was, of

course, subject to the suspension that I have affirmed and finalized in that Proceeding. It is also subject to my directive that no further grant applications be approved. Indeed, absent the Ninth Circuit's September 21 order in *San Francisco v. Burnley* directing the Department to issue a decision on the December 31 Application, no specific denial would be necessary. However, I am rendering a decision on the December 31 Application in order to avoid any uncertainty about the FAA's compliance with the court's order.

Finally, as you are aware, a contingent obligation in favor of the Commission pursuant to the court's order in *San Francisco v. Burnley* has been recorded. I intend to take no action to disturb that obligation pending further judicial review, if any.

In this regard, I should note that in the view of the manager of the FAA's Grants-In-Aid Division, as of August 29, 1988, the City and County had not adequately developed any of its pending applications, including the December 31 Application, or provided the documentation usually required before the FAA can approve an application and issue a grant offer. *See* Johnson Supplemental Declaration at 5-8. Thus, the FAA is precluded from proceeding with the Application, should you determine to act in conformity with my Decision in the related proceeding or prevail on review.

Accordingly, pursuant to the authority contained in sections 509(b)(1), 511(a)(1), and 519 of the Airport and Airway Improvement Act of 1982, 49 U.S.C. §§ 2208(b)(1), 2210(a)(1) and 2218, and the order of the court in *City and County of San Francisco v. Burnley*, Nos. 88-7320 and 88-7347 (9th Cir., September 21, 1988), I hereby deny the December 31, 1987 Application of the City and County for airport improvement grants at SFIA under the Airport and Airway Improvement Act of 1982, as amended.

Sincerely,

/s/ T. Allan McArtor
T. Allan McArtor

APPENDIX F

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

FAA Docket No. 13-86-2

In Re San Francisco Airports Commission

ORDER ON RECONSIDERATION

I. INTRODUCTION

On December 12, 1988, the Administrator issued a decision[1] finding that the San Francisco Airports Commission (the "Commission"), the operator of the San Francisco International Airport ("SFIA"), for its proprietor, the City and County of San Francisco (the "City and County"), had failed to operate SFIA for the use and benefit of the public on fair and reasonable terms without unjust discrimination by its refusal to allow a Burlington Air Express Stage 2 compliant Boeing Q707 aircraft to operate at SFIA. Accordingly, the Administrator determined that the Commission had violated an assurance of a grant agreement that it had entered into with the Federal Aviation Administration ("FAA") under the Airport and Airway Development Act of 1970. The Administrator therefore affirmed and made final the temporary suspension of approval of funding at SFIA. The Administrator additionally directed that no further applications for grant funds involving SFIA be approved until the Commission complies with its grant obligations.

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[1] This decision, captioned "Administrator's Decision and Final Order of Noncompliance and Default," was issued in this docket and served on all parties of record.

Separately, in a letter sent the same day to the Director of Airports, SFIA, the Administrator denied an application filed by the City and County on December 31, 1987 for airport improvement grants at SFIA under the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 2201 *et seg.*[2] This letter was sent to the Director pursuant to an order issued by the U.S. Court of Appeals for the Ninth Circuit in *City and County of San Francisco v. Burnley*, No. 88-7320 (9th Cir., September 21, 1988). The denial of the Commission's December 31 application was based on the findings the Administrator made in his Decision.[3]

On January 3, 1989, the Commission filed a "Petition for Reconsideration" of the Administrator's Decision and letter. Thereafter, on January 6, 1989, the Commission filed a supplement to its petition, seeking reconsideration of an additional issue, which it asserted had just come to its attention. After careful consideration of the Commission's petitions and the comments that have been filed in response to those petitions by the two other major parties to this proceeding—the Federal Aviation Administration's Office of Chief Counsel ("FAA Counsel") and Burlington Air Express ("Burlington")—I have concluded that none of the findings of fact or legal determinations in the Administrator's Decision or letter were erroneous or need to be modified. Accordingly, for the reasons set forth below,

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[2] The Administrator's letter was captioned "Re: December 31, 1987 Application for Approval of Grants Under the Airport and Airways Improvement Act of 1982."

[3] The Commission's December 31, 1987 application consisted of an aggregation of several earlier grant requests, which it consolidated into a single, new application. The Administrator's letter pointed out that the Commission's December 31 application was incomplete. The Administrator accordingly advised the Director that, notwithstanding the findings in his decision, the FAA would be precluded from processing the Commission's application even if the Commission were to cure its default. Administrator's letter at 2-3.

the Administrator's December 12 Decision and letter are affirmed, and the Commission's petitions for reconsideration are denied.

II. THE COMMISSION'S PETITIONS FOR RECONSIDERATION

In seeking reconsideration, the Commission asserts that these two documents are "fundamentally intertwined" and that each of its grounds for reconsideration applies to both documents, which it refers to collectively as "the Administrator's Decision". The Commission further states that, as grounds for reconsideration, it is raising only matters arising from changed circumstances and recent events (Pet. at 1).

The Commission's first substantive ground for reconsideration is its claim that, contrary to the determinations made in the Administrator's December 12 Decision, the Commission is not in default of the grant obligations it entered into with the FAA. The Commission says that this is so because as of January 1, 1989 there was a new, independent reason justifying its exclusion of Burlington's aircraft which was not addressed or considered in the Administrator's Decision. Specifically, the Commission states that, as of January 1, 1989, section 4(B)(1)(a) of its 1988 Noise Abatement Regulation required that all carriers operating at SFIA on this date conduct at least 25 per cent of their operations at SFIA with Stage 3 certificated aircraft, and that Burlington has repeatedly stated that it has no plans to use any of these quieter Stage 3 aircraft.[4]

The Commission asserts that Burlington, therefore, currently is unable to operate at SFIA for a reason other than any of those considered by the Administrator in his

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[4] It is the Commission's position (Pet. at 6) that Burlington is "an operator" within the meaning of this provision. Burlington, however, disputes this conclusion on the basis that it is not a direct air carrier but only an air freight forwarder that does not operate any aircraft.

Decision, but rather because of its failure to comply with the Commission's Stage 3 percentage operating requirements or secure a waiver from them. The Commission further notes that there has been no allegation, much less any finding, that this "independent requirement" of its regulations contravenes any of the contractual obligations in the grant agreements it entered into with the FAA.

The Commission additionally contends that on December 28, 1988 Burlington initiated a new application process before the Commission which, when completed, will determine the status of Burlington's proposed operations under the Commission's Stage 3 Regulation, and, accordingly, the determination in the Administrator's Decision that it was not necessary for Burlington to exhaust its administrative remedies before the Commission is no longer valid. In this regard, the Commission submits that, on December 28, Burlington sent it a letter requesting "permission to operate" at SFIA.[5] The Commission says that in response to Burlington's letter, it forwarded to Burlington its standard entry package and that it is committed to processing Burlington's application promptly.[6] On February 7, 1989,

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[5] In this letter, a copy of which is attached to the Commission's petition, Thomas F. Murrill, Executive Vice President, requested permission on behalf of two direct air carriers, Southern Transport and/or Rosenbalm Aviation, to operate one flight per day, Monday through Friday, at SFIA with Q707 or hushed DC-8 aircraft, with the departure for this flight scheduled between 1900 and 2100 and the arrival between 0430 and 0630. Mr. Murrill further stated that if Southern or Rosenbalm were to operate all of its proposed flights, more than 25 percent of there carriers' flights would be operated with Stage 3 aircraft and they would thus satisfy the Commission's minimum percentage requirement. Thereafter, in a letter dated February 3, 1989, Mr. Murrill advised the Commission that the arrival period for Burlington's proposed operation had been changed so that its flight would arrive between 0630 and 0730.

[6] The Commission states that five air carriers have already requested variances from the requirement that they conduct at least 25 percent of their operations with Stage 3 certificated aircraft (or from other

the Commission sent Burlington a follow up letter indicating that it had not received a completed entry package.

The Commission construes Burlington's December 28 letter as a request for a variance from its new Stage 3 percentage requirement (*see* Pet. at 3-4). Based on this premise, the Commission asserts that Burlington has apparently changed its previous position that resort to the Commission's administrative processes would be futile; and that Burlington now is seeking permission to operate at SFIA under the Commission's 1988 regulation, after all. The Commission accordingly contends that the determination in the Administrator's December 12 Decision—that there was no need for Burlington to further exhaust its administrative remedies before the Commission by seeking a variance from the Commission's 1988 Resolution—is no longer valid and it asks that the Administrator's decision be vacated. Furthermore, the Commission submits that there accordingly is no basis for the prospective remedy (*i.e.*, the withholding of approval of future grant applications) that the Administrator imposed in his decision.

In the supplement to its petition, the Commission seeks reconsideration of the Administrator's Decision for an additional reason. Specifically, it states that the Commission of European Economic Communities ("EEC") recently proposed a directive that would prohibit the addition of Stage 2 aircraft to the registers of any of its Member states after November 1, 1990. The Commission contends that since this proposal is essentially identical to the approach it has adopted for controlling noise at SFIA, the determinations in the Administrator's December 12 Decision that the Commission had violated its grant agreements are not supportable.

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requirements of the Commission's 1988 Resolution) and that it has granted variances from its percentage requirement to two all-cargo carriers, DHL and Evergreen, while denying three other requests.

III. COMMENTS OF OTHER PARTIES

On February 7, 1989, pursuant to Notices issued by the Administrator on January 17 and 31, 1989, FAA Counsel and Burlington filed comments on the Commission's two Petitions for Reconsideration.[7]

FAA Counsel states that the rules which have governed this proceeding, 14 C.F.R. Part 13, do not provide for the filing of petitions for reconsideration and that no such right should be recognized here. FAA Counsel additionally believes that recognition of a right to reconsideration in cases such as the instant one is not necessary and would create a dangerous precedent, in view of the requirement set forth in section 519 of the Airport and Airway Improvement Act of 1982 that final decisions in future airport grant enforcement proceedings be issued within 180 days.

Accordingly, if it is decided that the Commission's petition should be entertained in this case, FAA Counsel says it should be made clear that this is being done on an informal, discretionary basis. Comments at 2-13.

FAA Counsel further asserts that the Commission, in any event, has failed to show any reason justifying reconsideration. It says that while the Commission purports to raise as grounds for reconsideration matters that have arisen by reason of changed circumstances and recent events, this evidence could have been discovered previously with due diligence. FAA Counsel contends that the Commission accordingly has failed to raise any new arguments in support of its request for reconsideration. Comments at 13-23.

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[7] San Mateo County, which was granted intervenor status in this proceeding, filed a pleading, dated January 30, 1989, that it styled as a petition for reconsideration. However, this two-page document simply expresses support for the Commission's petition and supplement, contains no substantive argument, and raises no other grounds for reconsideration. Consequently, this pleading will be treated as an answer in support of the Commission's petition and supplement.

As for the merits of the Commission's filings, FAA Counsel contends that Burlington's recent request to operate at SFIA does not undermine the Administrator's findings on the question of Burlington's exhaustion of its administrative remedies before the Commission because requesting a variance from the Commission's Stage 3 requirement is unrelated to the grant violation charged in this proceeding. Moreover, it is FAA Counsel's view that Burlington does not need a variance from section 4(B)(1)(a), since it is solely an air freight forwarder and does not directly operate any aircraft. Comments at 23-29.

With respect to the Commission's second ground for reconsideration, *i.e.*, its assertion that its rules are not discriminatory because they are analogous to the directive recently proposed by the EEC, FAA Counsel points out that the question of "non-addition" or "grandfathering" rules banning new types of retrofitted Stage 2 aircraft was considered in this proceeding, and these provisions were found to be discriminatory. FAA Counsel accordingly contends that the possibility that the EEC may adopt a Stage 2 non-addition rule does not warrant reconsideration or reversal of the Administrator's decision. Comments at 30-31.

Burlington disputes the Commission's assertion that there has been an apparent change in its position over the question of the exhaustion of its administrative remedies before the Commission. Burlington states that its December 28, 1988 and February 3, 1989 letters to the Commission should not be construed to mean that it has now decided to seek a waiver from the Commission. It says that its intention rather was to seek permission to operate at SFIA in view of the Administrator's December 12 decision and to make it clear to the Commission that its operators (i.e., Southern Air Transport and/or Rosenbalm)

would comply with the percentage requirement mandated in section 4(B)(1)(a).[8]

Burlington further states that since it is only an air freight forwarder, it would be arbitrary, capricious and discriminatory for the Commission to define it as an operator. Burlington notes that as an air freight forwarder it exercises no operational control over aircraft and that Southern or Rosenbalm, which it does not own or have any financial interest in, would have full operational control over its proposed flights at SFIA. It submits that it, therefore, does not need a variance from section 4(B)(1)(a).

IV. DETERMINATIONS OF THE ADMINISTRATOR

A. The Remedy Imposed in the Administrator's December 12th Decision and Letter

The issues the Commission has raised on reconsideration are limited to the findings in the Administrator's December 12, 1988 Decision that the Commission's actions in excluding the Q707 amounted to a violation of its grant obligations. However, in seeking reconsideration, the Com-

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[8] Burlington was explicit about its intentions in a letter its President, David L. Siegfried, sent to SFIA's Director of Airports on February 21, 1989. As is stated in the fifth and sixth paragraphs of that letter:

> . . . we see no point in wasting time and money on the quite voluminous entry package you have sent us. Moreover, we assume that if we completed the entry package form, your tactic would be to set it for a hearing. That would place us on the horns of a dilemma. It would make no sense for us to waste your time and money and ours on another proceeding when the issues set forth above have not been resolved. On the other hand, if we declined to participate in such proceedings, we assume you would enter a default judgment against us.
>
> It appears to us that this dilemma is not accidental. Instead, it appears to be a trap carefully laid by your legal counsel to put us in a 'no win' position and to wear us down with still further legal proceedings which are unnecessary . . .

mission has chosen not to attack the appropriateness of the remedy the Administrator imposed in his decision—specifically, the suspension of approval of the Commission's pending and future grant applications until such time as the Commission cures its default of its grant obligations.[9] The statutory authority of a grant-giving agency to suspend current and prospective funding when recipients fail to comply with the conditions in their grant agreements is well established.

Indeed, the power of agencies, generally, and the Federal Aviation Administration, in particular, in its administration of the airport grant programs, to impose sanctions of this nature have met with approval from the courts. *United States v. County of Westchester*, 571 F.Supp. 786 (S.D. N.Y., 1983) (suspension and withholding of further payments of grant funds under the Airport and Airway Development Act of 1970 and the Airport and Airway Improvement Act of 1982); *State of South Dakota v. Adams*, 587 F.2d 915 (8th Cir. 1978); and *State of Nebraska v. Tiemann*, 510 F.2d 446 (8th Cir. 1975) (suspension of highway funding).

B. Availability of Reconsideration

FAA Counsel opposes reconsideration of the Administrator's Decision and letter, arguing that the rules that have governed this proceeding (14 C.F.R. Part 13) do not explicitly provide for the filing of petitions for reconsideration. FAA Counsel concedes, however, that this does

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[9] One issue related to this proceeding, however, needs to be briefly clarified. On August 11, 1989, the United States Court of Appeals for the Ninth Circuit issued a order denying the Commission's petition for a writ of mandamus ordering the FAA to approve its Fiscal Year 1986 and 1987 grant applications. This order states, correctly, in its second sentence that the Administrator's December 12, 1988 Decision "prospectively denied all future grant applications by San Francisco." However, the Administrator's Decision denied the Commission's pending grant applications, as well.

not bar reconsideration of the Administrator's decision and letter. The absence of a specific provision authorizing reconsideration does not preclude an agency from reconsidering one of its earlier decisions. Indeed, reconsideration is an integral part of the administrative process.[10] Reconsideration enables an agency to reexamine a prior decision and, when necessary, correct, modify or reverse that decision if it determines that changed or new facts, or erroneous earlier findings, warrant such a result. Reconsideration also allows an agency to state its view on various issues and amplify its consideration of the record of a proceeding prior to judicial review.[11]

The Commission's two filings thus were not inappropriate.[12] Moreover, in view of the fact that there are currently three petitions for review of the Administrator's

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[10] It should also be noted that the Administrative Law Judge in this proceeding issued an order on reconsideration that modified several of his earlier determinations. Order of Chief Administrative Law Judge William A. Kane, Jr., issued November 3, 1987.

[11] The power of an agency to reconsider its decisions has been recognized by the courts. Indeed, as the U.S. Court of Appeals for the District of Columbia observed in one case, "The power to reconsider is inherent in the power to decide." *Albertson v. FTC*, 182 F.2d 397, 3999 (D.C. Cir. 1950). *See also Delta Air Lines v. CAB*, 497 F.2d 608, 615 (D.C. Cir. 1973) and *Frontier Airlines v. CAB*, 439 F.2d 634 (D.C. Cir. 1971).

[12] It should be pointed out, however, that petitions for reconsideration of a final agency determination usually are entertained under limited circumstances. For example, as FAA Counsel notes, where a petition for reconsideration is based, in whole or part, on new matter, the petitioner is usually required to state that it could not have known or discovered with due diligence such matter prior to the date a case was submitted for decision. *See, e.g.*, 14 C.F.R. § 302.37. Here, the Commission certainly should have been aware of the fact that its Stage 3 Resolution was about to become effective, and probably of the fact that EEC's proposed directive was forthcoming. Nonetheless, the Commission's petition and supplement will be considered in this case.

December 12 decision and/or letter pending before the U.S. Court of Appeals for the Ninth Circuit,[13] it appears that it would be worthwhile, and in the interests of judicial efficiency, to address the issues raised by the Commission in its petition and supplement at this juncture. As for FAA Counsel's assertion that the Commission has not demonstrated that reconsideration of the Administrator's decision or letter is warranted, this objection goes to the substance of the Commission's filings, a matter that will be discussed below.

C. The Exhaustion Question

The Commission has not demonstrated that any of the Administrator's findings or legal conclusions relating to Burlington's alleged failure to exhaust its administrative remedies were either erroneous or need to be modified.[14] In his December 12th Decision, the Administrator affirmed the finding of the Administrative Law Judge that Burlington was justified in not continuing to seek a waiver from the Commission's 1988 Resolution because the record showed Burlington had no realistic expectation, after three years of repeated efforts to gain access, of being successful. As the Administrator stated, there is ". . . a limit beyond which a litigant need not continue to engage in a process where there is no realistic hope for the sole purpose of exhausting administrative remedies." Administrator's Decision at 20, n. 19. The record in this case, which the Commission does not dispute, shows that Burlington

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[13] *County of San Mateo v. Federal Aviation Administration, et al.* (No. 89-70053); *City and County of San Francisco, et al. v. Federal Aviation Administration, et al.* (No 89-70055); and *City and County of San Francisco, et al. v. Federal Aviation Administration, et al.* (No. 89-70057).

[14] Throughout the course of this proceeding, the Commission has repeatedly argued not only that Burlington should have exhausted its administrative remedies, but also that the Commission's administrative processes should be accorded deference. However, the Commission is not entitled to the deference, it has asserted for itself.

has attempted to gain entry into SFIA for more than three years, that it sought a waiver from an earlier Commission resolution without success, and that it had no reason to believe that the Commission would be likely to act any more favorably with respect to a request for a waiver from its 1988 Resolution.[15] Burlington accordingly elected not to seek a waiver from the Commission's 1988 Resolution.

The Commission has not shown that any of the findings in the Administrator's decision on the so-called exhaustion question were in error; rather, it contends that, as a result of its December 28, 1988 letter, Burlington has "apparently changed" its position and decided to seek a waiver from the Commission's 1988 Resolution—specifically, a waiver from the Commission's new Stage 3 percentage requirement.[16] Accordingly, the Commission's assertion of changed circumstances simply is not demonstrated, and its allegation of error with respect to the Administrator's find-

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[15] Moreover, there has been no indication that the Commission is any more inclined than it has previously been to allow the Q707 to operate at SFIA. Thus, there is no clear assurance based on recent history that Burlington would be permitted to operate at SFIA even if the Commission were to determine that its proposed operation complied with the Commission's percentage requirement or was entitled to a waiver from that provision.

[16] Burlington's comments and letter of February 21, 1989 suggest the Commission is mistaken in this belief. Burlington says it decided not to seek a waiver from the Commission's 1988 Resolution; nor does Burlington believe that, as an air freight forwarder, it is even subject to the Commission's requirement that 25 percent of a carrier's flights be operated with Stage 3 aircraft. Burlington asserts that the purpose of its December 28th letter, as supplemented by its letter of February 3, 1989, was merely to seek permission to operate at SFIA in view of the Administrator's December 12th decision, not to seek a waiver from the Commission's percentage requirement, as the Commission appears to believe. Since the Commission's percentage requirement is not at issue in this proceeding, no ruling is made as to whether this provision is unfair, unreasonable or unjustly discriminatory.

ings on the question of Burlington's alleged failure to exhaust its administrative remedies is misplaced.[17]

D. The EEC's Directive

The Commission further contends that the EEC's proposed directive that would prohibit the addition of Stage 2 aircraft to the registers of any of its Member states after November 1, 1990, makes the Administrator's finding that the Commission breached it grant assurances not supportable. However, the Commission totally fails to show how this proposed regulation, which has yet to be implemented and does not apply to any U.S. airline, bears any relevance to the issues in the instant proceeding.

Moreover, even though the Commission contends that this proposal is essentially identical to the approach it has adopted for controlling noise at SFIA, the question of the use of "nonaddition" or "grandfathering" rules was considered in view of the facts of this proceeding and these provisions were found to be discriminatory. Administrator's Decision at 14, 21-22. The Commission has presented no new facts or legal arguments on reconsideration dem-

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[17] The findings regarding the futility of Burlington's continued efforts to gain access at SFIA, affirmed by the Administrator, are supported by the record. The Commission's new contentions on Reconsideration regarding its Stage 3 Regulation further support this finding. The doctrine requiring an exhaustion of administrative remedies is designed to prevent premature, incomplete, or unnecessary judicial review of an agency's decision or other final action in the administrative process. *See McKart v. U.S.*, 395 U.S. 185 (1969). The agency charged by Congress with administering or enforcing a statute is the agency whose processes must be exhausted prior to judicial review. Absent clear direction from Congress that state remedies must be exhausted first, there is no requirement that prevents prompt institution of the federal agency process. In the instant proceeding, however, the Commission has incorrectly assumed that its own processes were required to be exhausted by Burlington. Exhaustion principles apply to the FAA's proceedings, not the Commission's; and Burlington has exhausted its remedies before this agency.

onstrating that any of the Administrator's determinations on this issue were in error.

E. Conclusion

This proceeding has focused on the question of whether the Commission, as a result of its exclusion of the Q707, has breached its contractual obligation, resulting from the grant assurance it executed, to operate SFIA for the use and benefit of the public on fair and reasonable terms and without unjust discrimination. The Commission voluntarily agreed to this contractual obligation in exchange for its receipt of Federal funds. The applicable statutory provision mandating this obligation, section 18 of the Airport and Airway Development Act of 1970, 49 U.S.C. 1701 *et seg.*, states plainly:

> As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that . . . the airport to which the project for airport development relates will be available to the public on fair and reasonable terms and without unjust discrimination.

49 U.S.C. § 1718.

In its two filings, the Commission has not demonstrated that any of the findings or conclusions in the Administrator's December 12 Decision or letter either were erroneous or need to be modified on the basis of changed circumstances. The Commission still has not provided satisfactory assurances that it will operate SFIA in the manner it agreed to in its grant assurance. The Commission consequently has shown no reason why any of the findings in the Administrator's December 12 Decision or letter should be modified or reversed. Nor has it shown why the remedy imposed in that Decision finalizing the temporary suspension of funding approvals at SFIA, and directing that no

further applications for grant funding at SFIA be approved until the Commission is in compliance with its grant obligations, should be modified.

ACCORDINGLY, the Commission's Petitions for Reconsideration of the Administrator's December 12, 1988 Decision and letter are denied.

JAMES B. BUSEY

/s/ James B. Busey
JAMES B. BUSEY
ADMINISTRATOR

OCT 2 1989
Date

APPENDIX G

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION NO. 86-0073

WHEREAS, the City and County of San Francisco is responsible for the operation of San Francisco International Airport; and

WHEREAS, the City and County of San Francisco implements such responsibility through the police power of the state or by initiative of the City and County of San Francisco as the proprietor of San Francisco International Airport; and

WHEREAS, in the exercise of its proprietary authority, the City and County of San Francisco has the right and obligation to adopt reasonable noise regulations governing, *inter alia*, the type of aircraft and composition of the fleet operating into and out of San Francisco International Airport; and

WHEREAS, the legislative history of Section 611 of the Federal Aviation Act of 1968 (S.Rep. No. 1353, 90th Cong., 2d Sess., at 7), confirmed the intent of Congress not to affect by passage of the Act the rights of a state or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport; and

WHEREAS, in promulgating Noise Standards for Aircraft Type and Air Worthiness Certificates (14 C.F.R. Part 36, hereinafter "FAR-Part 36"), the Federal Aviation Administration ("FAA") provided that the noise limits specified therein were not intended to substitute federally determined noise levels for those more restricted limits determined to be necessary by individual airport proprietors; and

WHEREAS, legal authority and FAA policy permits airport owners, acting as proprietors, to deny the use of their

airports to aircraft on the basis of noise considerations, so long as such exclusion is nondiscriminatory; and

WHEREAS, consistent with its rights and obligations as determined above, the Airports Commission of the City and County of San Francisco, on May 17, 1978, adopted the San Francisco International Airport ("SFIA") Noise Abatement Regulation, Resolution No. 78-0131, to require a progressive improvement in fleet mix and to encourage the retirement of older, noisier aircraft in favor of newer, quieter ones; and

WHEREAS, said Resolution No. 78-0131 established a reasonable (seven year) period of time for air carriers operating or seeking to operate at SFIA to replace noisy aircraft with quieter aircraft and, in connection therewith, provided an absolute deadline of January 1, 1985, by which date all aircraft, subsonic or supersonic, operating out of San Francisco International Airport, must have been certified under FAR-Part 36 Noise Standards; and

WHEREAS, said Resolution provided that "in order to continue operating at San Francisco International Airport all commercial jet powered transport type aircraft, which are of an aircraft type now operating at San Francisco International Airport must: (1) be certified under FAR-Part 36 Noise Standards; or (2) be replaced prior to January 1, 1985, with an aircraft that is certified under FAR-Part 36; or (3) receive currently approved retrofit modifications so as to be in compliance with FAR-Part 36 as implemented by sub-part E, FAR-Part 91, which retrofit modifications must be accomplished no later than January 1, 1985;" and

WHEREAS, said Resolution No. 78-0131 established, in Part 5 thereof, a procedure for airline operators to request a variance from the terms thereof; provided, however, that "under no circumstances will the Airports Commission extend the time of compliance with the Resolution beyond January 1, 1985;" and

WHEREAS, since July 1982, SFIA has been, and is currently, operating according to the terms of a variance from the State Noise Standards issued by the Secretary of the California Department of Transportation; and

WHEREAS, further pursuant to the foregoing rights and obligations, and in accordance with Resolution No. 78-0131, the Director of Airports, on September 28, 1984, issued Airport Operations Bulletin No. 84-07-AOB, confirming said Resolution and requiring that aircraft operating at SFIA document compliance with the terms thereof by January 1, 1985; and, on December 31, 1984, issued a memorandum to staff identifying aircraft types, including all Boeing 707 aircraft, precluded from operating at SFIA thereafter; and

WHEREAS, further pursuant to the foregoing, the Director of Airports, on December 17, 1985, issued Airport Operations Bulletin No. 83-07-AOB, confirming that as of January 1, 1985, all commercial jet powered aircraft operating at SFIA met FAR-Part 36, Stage 2, or Stage 3 Noise Certification Compliance standards and that there were no extensions permitted by Airports Commission Resolution beyond said date; and

WHEREAS, further in accordance with the foregoing, Airport Operations Bulletin No. 85-07-AOB required that, in order to operate at SFIA after December 17, 1985, all new type aircraft must meet Stage 3, Part 36 criteria, and that waiver for operation of new entry aircraft meeting Stage 2, Part 36 Federal Guidelines, could be granted by the Airports Commission pursuant to Resolution No. 78-0131; provided, however, that the minimum requirements for such a waiver would include (a) that aircraft noise level not exceed the maximum allowable Part 36, Stage 2 level for that type aircraft in takeoff, sideline or approach modes and (b) that aircraft not operate between the hours of 2400 and 0600; and

WHEREAS, on or about September 20, 1985, Southern Air Transport ("SAT") informed the Director of Airports that SAT sought to apply for a waiver to operate a Boeing 707-300C ("Q707") at SFIA on behalf of Burlington Northern Air Freight, Inc. ("BNAFI"); and

WHEREAS, following notification by SAT of its desire to operate the Q707 at SFIA on behalf of BNAFI, the Director of Airports solicited from SAT, BNAFI, and others information relevant to said request; and

WHEREAS, the Airports Commission, upon BNAFI's application for a waiver or variance from the aforementioned Resolution No. 78-0131 and the Airport Operating Bulletins issued in accordance therewith, the Commission scheduled a public hearing to consider said application, which hearing was held on March 18, 1986; and

WHEREAS, in connection with such hearing, the Commission received written materials submitted by BNAFI, including Comments dated March 10, 1986, and heard from witnesses testifying on behalf of BNAFI's application, including the designer and manufacturer of retrofit modifications to the Boeing 707 aircraft and SAT, the operator of the aircraft, as well as from the Director of Airports, and interested parties, including a representative from the California Department of Transportation, the Chairman of the Airport Community Roundtable, a pilot from a major air carrier, and representatives from communities surrounding SFIA; and

WHEREAS, the Commission considered such materials and testimony and other facts submitted as a part of the record, including, *inter alia*, Comments of Hugh J. Parry on the Proposed Operation Of Q707 Type Aircraft at SFIA; and

WHEREAS, the Q707 aircraft is a Boeing 707 aircraft which received retrofit modifications by the addition of a Tracor/Shannon "hush kit", which retrofit modifications

were neither approved as of the date of passage of Resolution No. 78-0131 nor accomplished by January 1, 1985; and

WHEREAS, the Q707 received FAR-Part 36, Stage 2 certification on March 6, 1985, by receipt of a Supplemental Type Certificate issued by the FAA; and

WHEREAS, the FAA-approved airplane flight manual supplement issued in connection with the aforesaid Supplemental Type Certificate provided that, in approving the manual, "no determination has been made by the Federal Aviation Administration that the noise procedures and levels in this manual are, or should be, acceptable or unacceptable for operation at, into or out of any airport;" and

WHEREAS, BNAFI did not acquire the Q707 until in or about November 1984; and

WHEREAS, BNAFI intended to operate the Q707 in the San Francisco Bay Area as part of a national freight forwarding service, using as its hub an airport facility located in Fort Wayne, Indiana; and

WHEREAS, BNAFI did not, prior to purchasing the Q707 and prior to purchasing the Q707 and prior to locating a package sorting facility in South San Francisco, examine applicable noise regulations at airports located in the areas in which it intended to operate, including specifically such regulations governing aircraft operations at SFIA, nor did BNAFI prior to purchasing such aircraft and prior to locating its sorting facility in South San Francisco, question SFIA personnel concerning the ability of the aircraft to operate into or out of SFIA in accordance with applicable Resolutions and Airport Operating Bulletins issued pursuant thereto; and

WHEREAS, other carriers operating at SFIA, in reliance on Resolution No. 78-0131 and Airport Operating Bulletins and advice issued pursuant thereto eliminated

from their fleets prior to January 1, 1985 all aircraft not in compliance prior to that date; and

WHEREAS, subsequent to January 1, 1985, no aircraft type operating at SFIA as of the date of Resolution No. 78-0131 had been allowed to continue operating thereafter unless: (a) certified prior to January 1, 1985; (b) replaced with an aircraft certified under FAR-Part 36 prior to January 1, 1985; or (c) having complied with FAR-Part 36 prior to January 1, 1985, by receipt of retrofit modifications approved as of the date of Resolution No. 78-0131 and accomplished prior to January 1, 1985; and

WHEREAS, in order to receive its FAR-Part 36, Stage 2, certification from the FAA in or about March 1985, the Q707 relied on both the thrust cutback and tradeoff provisions of FAR-Part 36, and was unable to achieve FAR-Part 36, Stage 2 compliance in takeoff mode without the use of the tradeoff provision; and

WHEREAS, BNAFI has offered to limit its gross takeoff weight to 305,000 pounds which, it contends, will enable it to meet FAR-Part 36 standards in takeoff mode without the use of tradeoffs (but, only with the use of thrust cutback) which weight limitation, in any event, appears mandated by gross landing weight restrictions at Fort Wayne, Indiana; and

WHEREAS, SFIA in furtherance of its noise abatement efforts, and with the support of the FAA, has encouraged departing aircraft to fly the Visual Shoreline Department on takeoff, which takeoff protocol cannot safely be observed through the use of a thrust cutback; and

WHEREAS, the use of thrust cutback on takeoff is safety related and, as such, is a matter of pilot's choice that cannot be mandated or enforced by SFIA; and

WHEREAS, without the use of a thrust cutback the Q707 is significantly louder in takeoff mode than any other

aircraft permitted to operate at SFIA since January 1, 1985; and

WHEREAS, pursuant to the aforementioned variance from State Noise Standards, SFIA is prohibited from "knowingly permit[ing] or authoriz[ing] any activity in conjunction with the airport which results in an increase of the size of the noise impact area" and "[W]hen, and if ever practical, [is to] encourage the routing and use of new and, if feasible, some current flights from SFIA, to other terminals in the Bay Area"; and

WHEREAS, the Q707, operating at SFIA, would affect a significant increase in CNEL values in three of the four community areas surrounding SFIA; and

WHEREAS, the Q707 aircraft can operate at Oakland International Airport pursuant to existing noise regulations at that facility, as a consequence of which BNAFI has been, and can continue, operating the Q707 International Airport; and

WHEREAS, SFIA has incurred liability to residents of communities surrounding SFIA as a result of nuisances found to be caused by aircraft noise, for which additional liability could be imposed were the Q707 to be permitted to operate at SFIA; and

WHEREAS, were the Airports Commission to grant to BNAFI a waiver or variance to operate the Q707 at SFIA on the basis of the facts set forth above, it could be required to grant waivers or variances to other similarly situated carriers seeking to operate the Q707 which, in turn, could result in a significant increase in the noise of the fleet currently operating at SFIA; and

WHEREAS, the purpose and effect of Resolution No. 78-0131 and Airport Operating Bulletins issued pursuant thereto was, and has been, significantly to reduce overall fleet noise, which purpose and effect would be adversely affected by the admission of the Q707 to operate to SFIA:

IT IS HEREBY RESOLVED that the application of Burlington Northern Air Freight, Inc. and/or its operator, Southern Air Transport, to operate the Q707 aircraft at San Francisco International Airport be, and is hereby, denied.

APPENDIX H

AIRPORTS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

RESOLUTION NO. 78-0131

WHEREAS, The City and County of San Francisco is responsible for the consequences which attend its operation of San Francisco International Airport.

WHEREAS, The right of the City and County of San Francisco to control the use of the San Francisco International Airport is a necessary concomitant, whether is be directed by state police power or by the initiative of the City and County of San Francisco as the proprietor of San Francisco International Airport.

WHEREAS, This proprietary control necessarily includes the basic right to determine the type of air service the City and County of San Francisco as proprietor wants the San Francisco International Airport to provide, as well as the type of aircraft to utilize those facilities.

WHEREAS, The legislative history of Section 611 of the Federal Aviation Act of 1958, (S.Rep. No. 1353, 90th Cong., 2d Sess., at 7.) demonstrates the intent of Congress not to substitute its judgment for that of the States or elements of local government who own and operate this nation's airports.

WHEREAS, Said Congressional intent is not to prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

WHEREAS, The preamble to 16 CFR., Par. 36, emphasize that local air proprietors have the responsibility for determining the permissible noise levels for aircraft using their airport.

WHEREAS, The monitoring provisions of Chapter 9,

Subchapter 6, Title 4 of the California Administrative Code are innocuous to air traffic in that the monitoring

of noise levels is a passive function involving ground noise measuring machines and recording sound volume data which in no wise intrude upon or affect flight operations and air space management in commerce.

WHEREAS, The State dictated employment of shielding and ground level facility configurations, as well as development of compatible land uses under the provisions of CNEL is patently within local police power control and beyond the intent of Congress in federal legislation.

WHEREAS, It is the intent of this Commission to do everything within its power to see that San Francisco International Airport complies with the provisions of Title 21, Subchapter 6, of the California Administrative Code.

WHEREAS, Public hearings regarding the adoption of a noise abatement control regulation for San Francisco International Airport have been held and the record of such hearings evaluated.

BE IT HEREBY RESOLVED, That this Commission adopts the following noise control regulation at San Francisco International Airport:

SAN FRANCISCO INTERNATIONAL AIRPORT NOISE ABATEMENT REGULATION

1. PREAMBLE

The San Francisco International Airport is governed by the law of the State of California which specifies acceptable levels of noise generated by airports within the state. The legally acceptable level will decrease substantially in 1981 and again in 1986. While the Airport is now in compliance with state law, significant reductions in aircraft generated noise will be necessary to remain in compliance in the future. Commercial carriers must progressively replace older and noisier aircraft in their fleets with newer, less noisy aircraft or at least with aircraft which have been retrofitted with less noisy engines. Further, the San

Francisco International Airport cannot remain in compliance with state law if air carriers introduce into their fleets various types of aircraft not now operating at San Francisco International which are noisier than the newer, quieter aircraft this regulation mandates. This regulation is designed to permit air carriers a reasonable period of time in which to replace noisy aircraft with quieter aircraft. It is designed to allow all air carriers sufficient time to plan for and acquire, by January 1, 1983, a fleet of aircraft which totally complies with Federal Aviation Regulations Part 36 Noise Standards. It is designed to put all carriers on notice that this Airport cannot and will not tolerate the introduction into this Airport of aircraft types not presently being utilized here unless those aircraft types have been certified as being in compliance with Federal Aviation Regulations—Part 36 Noise Standards. It is designed to provide an absolute deadline of January 1, 1985, by which date all aircraft, subsonic or supersonic, operating out of San Francisco International Airport must be certified under FAR 36.

2. PURPOSE

The purpose of this regulation is to provide for a continual reduction of Community Noise Equivalent Levels (CNEL's) at San Francisco International Airport and its environs, in accordance with the provisions of Title 21, Subchapter 6, of the California Administrative Code by (a) establishing a phased compliance period through January 1, 1985, within which all commercial jet powered transport type aircraft, subsonic or supersonic, must be certified under FAR Part 36; and (b) requiring new types of commercial jet powered transport type aircraft, subsonic or supersonic, not presently operating at SFIA to be certified under FAR Part 36, prior to operating at San Francisco International Airport.

3. EFFECTIVE DATE

This regulation shall become effective 90 days after the adoption of this regulation by resolution of the Airports Commission, City and County of San Francisco, pursuant to the powers and duties vested in the Airports Commission by Section 3.691 of the Charter of the City and County of San Francisco, recodified November 2, 1971, in effect December 7, 1971.

4. REGULATION

Part 1—In order to continue operating at San Francisco International Airport all commercial jet powered transport type aircraft, which are of an aircraft type now operating at San Francisco International Airport must: 1) be certified under Federal Aviation Regulations—Part 36 Noise Standards; or 2) be replaced prior to January 1, 1985, with an aircraft that is certified under Federal Aviation Regulations—Part 36; or 3) receive currently approved retrofit modifications so as to be in compliance with FAR Part 36 as implemented by Subpart E, FAR Part 91. Retrofit modifications must be accomplished no later than January 1, 1985.

Part 2—In order to operate at San Francisco International Airport all commercial jet powered transport type aircraft, subsonic or supersonic, which are of a type not presently operating at San Francisco International Airport must be certified under Federal Aviation Regulations—Part 36 Noise Standards prior to commencing operation.

Part 3—Airlines certified by the Civil Aeronautics Board or the California Public Utilities Commission to serve at San Francisco International Airport will file at the office of the Director of Airports, San Francisco International Airport, within 90 days of

the adoption of this regulation an initial report which contains a listing by aircraft registration number of all aircraft in their respective fleet which operate at San Francisco International Airport, denoting each aircraft's certification status with respect to FAR Part 36 as implemented by FAR Part 91, Sub-part E.

The Airports Commission recognizes that the airlines must conform to the Part 36 phased compliance schedule in Section 91.305 of Sub-part E, FAR Part 91, on a fleetwide basis. In order to demonstrate that the phased compliance schedule is being met, each airline certified by the CAB or the California Public Utilities Commission to serve at San Francisco International Airport will file with the Director of Airports a report showing the status of their fleet with respect to FAR Part 91, as of January 1, 1981, January 1, 1983 and January 1, 1985. Reports will be filed by January 31, 1981, January 31, 1983 and January 1, 1985, respectively.

Changes which have occurred in the status of an airline's operating fleet at San Francisco International Airport since the initial report will be delineated on each subsequent report.

Part 4—These regulations apply to all 2, 3 and 4 engine civil subsonic or supersonic turbojet airplanes with maximum weights of more than 75,000 pounds to include regularly scheduled aircraft, charter aircraft and aircraft engaged in intrastate, interstate and international commerce.

5. VARIANCES

Requests by airline operators for a variance from any provisions of this regulation will be considered by the Airports Commission when submitted in writing to the Di-

rector of Airports, San Francisco International Airport, not later than 60 days prior to the time the variance, if granted, would become effective. Requests for a variance must show the type of variance being requested, the effective time frame of the variance and the basis upon which the variance is sought.

Requests for variances will be heard by the Airports Commission at regularly scheduled meetings. Notice of the time, place and subject matter of the consideration of the request for variance will be published in the official minutes of the meeting of the Airports Commission not less than thirty days prior to that Airports Commission Meeting wherein the request for variance will be considered. In addition written notice of such meetings will be published in local newspapers of general circulation 30 days prior to the variance hearing.

At the Airports Commission Meeting considering the request for variance, the airline operator requesting the variance and interested members of the public may present evidence relevent to the determination of the existence of good cause.

Good cause will be found to exist if it is determined that the granting of the variance satisfies the public interest. In weighing the public interest the Airports Commission's consideration includes but is not necessarily limited to the following:

A) The economic and technological feasibility of complying with the noise control regulation of San Francisco International Airport.

B) The noise impact at San Francisco International Airport with respect to Title 21, Sub-chapter 6, of the California Administrative Code should the variance be granted.

C) The value to the public of the services for which the variance is sought.

D) Whether the airline operator is taking bona fide measures to the best of its ability to comply with these regulations.

The burden of proof shall be upon the applicant for a variance. The Airports Commission in granting a variance may impose reasonable conditions which it deems necessary to accomplish the purposes of these noise control regulations.

Notice of the decision of the Airports Commission on the requested variance will be made in writing by the Director of Airports to the aircraft operator prior to the effective date of the variance.

No variance will be considered which requests relief from the provisions of FAR Part 36 or FAR Part 91 as they apply to this Airports regulation unless a variance from the provisions of FAR Part 36 and FAR Part 91 has been previously granted to the airline operator by the appropriate Federal agency. Under no circumstances will the Airports Commission extend the time of compliance with the Regulation beyond January 1, 1985.

6. ENFORCEMENT

The Airports Commission in and for the City and County of San Francisco and pursuant to the authority granted by the State of California, shall reserve the right to revoke or suspend any and/or all operating permit(s) or license(s) granted by the Airports Commission to any airline operation when it has been determined that said airline has not complied with the provisions set forth herein.

7. SEVERABILITY

If any portion of this regulation or the application thereof to any aircraft operator is held unconstitutional or otherwise unlawful, the remainder of the regulation and the application of same to other aircraft operators shall not be affected thereby.

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-70053, 89-70055, 89-70057,
89-70482, 89-70483, 89-70500

CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,
Respondents.

On Petition For Review of Orders of
the Federal Aviation Administration

BRIEF OF PETITIONER CITY AND COUNTY
OF SAN FRANCISCO

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Attorneys for City and County of San Francisco

March 1, 1990

II. THE FAA DID NOT HAVE THE POWER OR THE REQUIRED BASIS TO CONCLUDE THAT THE COMMISSION ACTED UNLAWFULLY IN DENYING THE BURLINGTON WAIVER APPLICATION.

* * *

A. The FAA Had No Authority to Redetermine the Waiver Denial *De Novo* on New Evidence.

In this case, the FAA has second guessed the Commission's denial of Burlington's waiver application on the basis of noise data not submitted to the Commission while Burlington's application was before it. The FAA contends that it is entitled to engage in this *de novo* examination because

> [t]he issue to be decided is not whether the Commission should have granted the waiver, but whether the Commission has violated the terms of its grant assurances. Thus, the question of the accuracy or completeness of submissions by parties to the Commission during the waiver process are irrelevant, as are the specific fact findings associated with the waiver process. Neither affects the proceeding's examination of all facts related to the question of discriminatory behavior in violation of grant assurances.

FAA Decision at 20 n.19. The FAA thus argues that because San Francisco entered into a contract with the FAA, San Francisco's administrative determinations no longer possess the preclusive effect they otherwise would have under state and federal law. *People v. Sims,* 32 Cal. 3d 468, 186 Cal. Rptr. 77, 651 P.2d 321 (1982); *University of Tenn. v. Elliott,* 478 U.S. 788 (1986).

Whatever else may be true of the grant contracts entered into between San Francisco and the FAA, San Francisco clearly never agreed (even if it had the authority to

do so) to permit the FAA to determine *de novo* on the basis of new evidence a matter assigned to the discretion of the Commission.[85] As the Supreme Court has held in the grant context:

> The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981) (citations and footnote omitted). Because the grant agreements did not "unambiguously" give the FAA the power to redetermine *de novo* the Commission's discretionary determinations, the FAA cannot simply dismiss the Commission's findings and determination as "irrelevant."

Additionally, since the FAA is not enforcing a federal statute in this case, principles of federalism and comity require that the FAA and Burlington defer to, and not interfere with, the lawful processes of the Commission.

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[85] San Francisco was under no legal duty to grant waivers from lawful regulations. Under California law, "the granting of a variance rests largely in the *discretion* of the body designated by the ordinance for this purpose." *Bringle v. Bd. of Supervisors of County of Orange*, 54 Cal. 2d 86, 88, 4 Cal. Rptr. 494-95, 351 P.2d 765 (1960) (emphasis supplied). The scope of judicial review of a variance denial is limited to a determination "whether substantial evidence supports the findings of the administrative board and whether the findings support the board's action." *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 113 Cal. Rptr. 836, 837, 522 P.2d 12 (1974); Calf. Civ. Proc. Code § 1094.5.

University of Tenn., 478 U.S. at 788; *Ohio Civil Rights Comm'n. v. Dayton Christian Schools*, 477 U.S. 619, 627-29 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353 (9th Cir. 1986).

Thus, whether determined on the basis that the contract provided the FAA no legal authority to redetermine the grant waiver *de novo* on new evidence or on the basis of principles of federalism and comity, the FAA had no authority to engage in the *de novo* reconsideration of the waiver denial that it engaged in here.